the United States Congress and cannot vote in United States Presidential elections.

The Covenant sets forth unprecedented, specific limitations on the power of the federal government. While the sovereignty of the United States is expressly set forth in the Covenant, Congress voluntarily relinquished portions of its plenary authority over territories granted under Article IV, Section 3, Clause 2 of the United States Constitution. App. 85, § 501. The Covenant further provides that fundamental provisions of the Covenant (Articles I, II, and III as well as Sections 501 and 805) cannot be modified without the mutual consent of both parties. App. 82, § 105.

Under the Covenant, Congress also generally retains the ability to enact legislation applicable to the Commonwealth, but laws relating exclusively to the Commonwealth must specifically be so designated. App. 82, § 105. The Covenant identifies specific provisions of the United States Constitution and, under certain conditions, other federal laws that apply to the Commonwealth. App. 85-87, §§ 501-502. Not all provisions of the U.S. Constitution or federal laws are applicable to the Commonwealth.

Previously, the Ninth Circuit has held that even provisions of the ***U.S. Constitution***, which are applicable elsewhere in the United States, but are not made applicable to the Commonwealth explicitly through the Covenant, do ***not*** apply to it. *See, e.g., Hillblom v. United States*, 896 F.2d 426, 428-429 (9th Cir. 1990) (Territorial Clause not applicable); *Fleming v. Department of Public Safety*, 837 F.2d 401, 405 (9th Cir. 1988), *cert. denied*, 488 U.S. 889 (1988) (Eleventh Amendment not applicable). Similarly, Commonwealth laws based on the Covenant that would

violate the U.S. Constitution if enacted by a state or the federal government have also been upheld. *See, e.g., Wabol v. Villacrusis*, 958 F.2d 1450, 1452 (9th Cir. 1990), *cert. denied, sub nom. Philippine Goods, Inc. v. Wabol*, 506 U.S. 1027 (1992) (upholding prohibitions on acquisition of long-term interests in real property to persons not of Northern Mariana Islands descent); *Atalig*, 723 F.2d at 690 (upholding laws denying criminal defendants trial by jury); *Rayphand v. Sablan*, 95 F. Supp.2d 1133, 1140 (D.N.M.I. 1999), *aff'd sub nom. Torres v. Sablan*, 528 U.S. 1110 (2000) (upholding disproportionate composition of the legislature that violates "one person, one vote" doctrine).

Significantly, the Covenant contains several provisions that show the importance of land to the people of the Commonwealth. First, the United States agreed to transfer all the "real property" the Trust Territory held in the Northern Mariana Islands to the Government of the Northern Mariana Islands before the termination of the Trusteeship. App. 88-89, § 801. The Trust Territory held title to the submerged lands around and connecting the islands of the Commonwealth. Second, the Covenant restricted long-term ownership of interests in lands in the islands to those individuals of Northern Mariana descent. App. 93, § 805.

In exchange for these and other provisions, the Commonwealth agreed to lease certain of its lands to the United States government for military purposes. App. 89-91, §§ 802-803. The land conveyed to the United States is expressly set forth in the Covenant. In fact, Section 802(b) provides that, "[t]he United States affirms that it has no present need for or present intention to acquire any greater interest in property listed above . . . or to acquire any property in addition to that listed in Subsection (a),

above, in order to carry out its defense responsibilities." App. 89, § 802(b). With the exception of an agreement to lease limited submerged lands around two islands, App. 89, § 802(a)(1) and (3), there is no mention that the United States will assume ownership of any of the oceanic submerged lands in Article VIII of the Covenant or anywhere else in the document.

Despite this fact, the Ninth Circuit determined that none of the oceanic submerged lands held by the Trust Territory at its termination were returned to the people of the Commonwealth. It found that title vested in the federal government when it assumed sovereignty over the Commonwealth under Section 101 of the Covenant. App. 9-10. It based its decision on the so-called *Tidelands* cases or *United States v. California*, 332 U.S. 19 (1947), and its progeny, impermissibly expanding those decisions to apply to an entity (the Commonwealth) that did not enter the United States on equal footing with the States. App. 9.

The Court recognized that the Commonwealth could have retained its submerged lands through the Covenant because it is a Congressional act. App. 12. It found, however, that the agreement contained in Section 801 of the Covenant to transfer all "real property" held by the Trust Territory to the Commonwealth was not explicit enough. As a result, it held that the federal government, who was the trustee, secured 99.9% of the property interests from the people of the Commonwealth, its beneficiaries, because of the Covenant.

This holding ignored precedent of this Court regarding the trustee-beneficiary relationship that existed when the Covenant was negotiated and implemented and the proper interpretation of treaties with indigenous people.

Because of the circumstances surrounding the negotiation of the Covenant and precedent of this Court, any ambiguity contained in the Covenant is read against the United States and not in its favor. There is no evidence that the people of the Commonwealth had any idea that the United States would secure any property rights in the Commonwealth beyond those specifically set forth in Section 802. Indeed, there is significant evidence that would have led them to conclude that the United States would have received nothing more.

The Commonwealth asks that this Court grant its petition for a writ of certiorari to correct these errors and conform the Court of Appeals decision to existing Supreme Court authority and to correct a result that, if undisturbed, will lead to a loss of almost all of the scarce public resources of the Commonwealth.

ARGUMENT

The Ninth Circuit read the Covenant solely from the perspective of the United States and interpreted using it only certain federal case law. This was improper. Because of the implications of the trustee-beneficiary relationship that existed when the Covenant was negotiated as well as this Court's precedent regarding interpreting treaties with indigenous people, any ambiguity in the Covenant must be read against the United States, not in its favor. Because the Ninth Circuit read the purported ambiguity in Section 801 against the Commonwealth, this petition should be granted to correct the situation.

Moreover, the trustee-beneficiary relationship created another implication that the Ninth Circuit refused to

consider, despite this Court's precedent. Under the common law regarding trusts, the United States had to make clear to the people of the Commonwealth that it would obtain title to 99.9% of the property interests of the Commonwealth under the Covenant. This was not made clear to the people of the Commonwealth at all in the Covenant or during the negotiations. As such, the purported transfer is void. The petition should also be granted to address the Ninth Circuit's decision ignoring the trusteeship and its implications.

A. Ninth Circuit Failed To Follow Existing Supreme Court Precedent Regarding The Proper Reading Of The Covenant.

The Covenant is a treaty between the United States and the people of the Commonwealth. When the agreement was reached, both were considered sovereign (although the people of the Commonwealth were under the Trusteeship at the time). In such circumstances, this Court has held that agreements like the Covenant must be read as the indigenous party, such as the people of the Commonwealth, would have interpreted it. The Ninth Circuit did not follow these rules and instead interpreted the agreement entirely based on certain federal case law.

As this Court has held, "[a] treaty, including one between the United States and [indigenous people], is essentially a contract between two sovereign nations." *Washington v. Washington State Commercial Passenger*, 443 U.S. 658, 675 (1979) (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903)). "[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the [indigenous people]."

Washington, 443 U.S. at 676 (quoting *Jones v. Meehan*, 175 U.S. 1, 11 (1899). As this Court pointed out in *Washington*, "[t]his rule, in fact, has thrice been explicitly relied on by the Court in broadly interpreting these very treaties in the Indians' favor." *Washington*, 443 U.S. at 676 (citing *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979); *Tulee v. Washington*, 315 U.S. 681 (1942); *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919); *United States v. Winans*, 198 U.S. 371 (1905)). Moreover, "treaty ambiguities are resolved in [the indigenous people's favor]." *Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 195 n.5 (1999) (citing *Winters v. United States*, 207 U.S. 564 (1980)).

The Ninth Circuit did not follow this precedent. The panel found an ambiguity in the Covenant – the agreement between the indigenous people in the Commonwealth and the United States – regarding title to the submerged lands. In particular, it acknowledged that the Commonwealth could retain submerged lands under the Covenant because Congress approved it. App. 12. It did not, however, believe that the grant contained in Section 801 was express enough to allow the Commonwealth to retain oceanic submerged lands. App. 12-14. This holding does not follow the precedent of this Court. Any ambiguity in the Covenant should have been read against the United States, not in its favor.

The indigenous people of the Commonwealth – the Chamorro and Carolinian people – are not a recognized Indian tribe. The same deference used to interpret Indian treaties should still, however, be used to interpret the Covenant. Like the Indian treaties, the Covenant is the result of the negotiation of two sovereign people, although without the same bargaining power. When the people of

the Commonwealth approved the Covenant, the United States served as their trustee. The Trusteeship resulted from the occupation of the islands after World War II by the United States. In other words, the people of the Commonwealth were in a similar conquered state during the negotiations, as many Indian tribes were.

Moreover, such a rule is consistent with the trustee-beneficiary relationship. Because of the inherent problems with dealings between trustees and beneficiaries, all such transactions are interpreted against (not in favor of) the trustee. *See* Restatement of the Law of Restitution, Section 191, Cmt. A.

Reading any ambiguity in the Commonwealth's favor is also consistent with the statements made by the late Congressman Phillip Burton, floor manager and principal sponsor of the joint resolution approving the Covenant for the United States. He said: "***all possible ambiguities*** should be resolved in favor of and to the benefit of the people and government of the Northern Mariana Islands." 122 Cong. Rec. 7273 (Mar. 18, 1976) (emphasis added).

The proper interpretation of the Covenant is very significant in this case because it is determinative of the dispute. Based on the experiences of the people of the Commonwealth, the language in the Covenant was broad enough to encompass the retention of submerged lands by the Commonwealth. Or the language was at least broad enough to lead the people of the Commonwealth to the conclusion that title to the submerged lands would vest in the Commonwealth. In light of the trustee-beneficiary relationship, it is more important in this circumstance to read any possible ambiguity on this point against the United States and not in its favor.

Specifically, Section 801 of the Covenant provides:

> All right, title and interest of the Government of the Trust Territory of the Pacific Islands in and to real property in the Northern Mariana Islands on the date of the signing of this Covenant or thereafter acquired in any manner whatsoever will, no later than upon the termination of the Trusteeship Agreement, be transferred to the Government of the Northern Mariana Islands.

This indicates the intent to transfer all the "real property" rights held by the Trust Territory in trust and return them to the beneficiaries – the people of the to-be-formed Commonwealth. The Trust Territory held title to submerged lands. Its statutes, case law, and actions transferring its property interests to the Commonwealth evidence this fact. *See* Trust Territory Code, Title 67, § 2; *Ngiraibiochel v. Trust Territory*, 1 TTR 485, 489 (1958); Secretarial Order No. 2969, 40 Fed.Reg. 811, 812 (1974) (permitting transfer of all public lands except submerged lands held by Trust Territory). It is also consistent with the historic understanding of the people of the Commonwealth who traditionally have claimed rights in submerged lands and reefs around the islands. This means that the language of Section 801 would have led the people of the Commonwealth to believe they retained submerged lands.

This understanding would even have been consistent with federal law, which recognizes that submerged lands are a type of "real property." *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 547 (1987) (Alaska's title to public lands "extend[ ] to a line three miles from its coastline"); *Hamilton v. Myers*, 281 F.3d 520, 530 (6th Cir. 2002) ("the mere fact that [lands] have since become submerged

by [Reelfoot Lake] does not deprive the owners of their title to the land. . . .") (citations omitted); *Ysleta Del Sur Pueblo v. Laney*, 199 F.3d 281, 289 (5th Cir. 2000) (submerged lands are a type of real property when applying *Ex parte Young* doctrine); *see* 28 U.S.C. §§ 2409a(i) and (j) (including "tide or submerged lands" among types of permissible real property disputes covered by the act). Indeed, the federal government has transferred certain submerged lands as real property to states and territories. 43 U.S.C. § 1311; 48 U.S.C. § 749. This would not be possible if submerged lands were not "real property."

Finally, other sections of the Covenant would have served to bolster an understanding of the people voting on the Covenant that the Commonwealth would have retained the Trust Territory's submerged lands. For instance, the federal government agreed to lease certain portions of the islands of the Commonwealth under Section 802 of the Covenant. The property to be leased includes portions of the islands of Tinian and all of Farallon de Medinilla as well as the "waters immediately adjacent thereto." App. 89-90, Section 802(a). If the Commonwealth did not receive title to submerged lands, there would have been no need for the United States to lease the "waters immediately adjacent" that it did from the Commonwealth. It would have owned them already. This reference would have been unnecessary.

Similarly, the text of Section 802(b) confirms that the Covenant set specific limitations on the property held by the United States. In relevant part, Section 802(b) provides that, "[t]he United States affirms that it has no present need for or present intention to acquire any greater interest in property listed above . . . or to acquire any property in addition to that listed in Subsection (a),

above, in order to carry out its defense responsibilities." Covenant § 802(b) (emphasis added). In other words, the United States affirmed that the only property rights it acquired through the Covenant were those specifically listed in Sections 802 and 803.

The Ninth Circuit's decision regarding whether purported ambiguities in the Covenant are to be read against the Commonwealth or the United States should be heard to conform the precedent of the Ninth Circuit to that of this Court. This is especially important as the language of the Covenant and the experiences of the people of the Commonwealth would have left the voters who approved the Covenant with the opposite conclusion as the one reached by the Ninth Circuit with respect to oceanic submerged lands.

B. The Ninth Circuit's Decision Not To Consider The Trustee-Beneficiary Relationship Of The Parties Is Contrary To The Precedent Of This Court.

The panel could not explain how the United States fulfilled its trustee obligations to the Commonwealth if the Commonwealth lost its submerged lands in the Covenant. It did not even try. It simply stated that:

> We also refuse to extend common law trust principles to an international agreement that constituted, on the part of the people of the Northern Mariana Islands, 'a sovereign act of self-determination.'

App. 10, n.6. In essence, the panel determined that the United States' obligations as trustee were meaningless. This holding conflicts with the precedent of this Court.

This Court has repeatedly held that when the federal government undertakes trustee responsibilities with respect to indigenous people, its actions must be consistent with the dictates of the restatements of the law. *See, e.g., United States v. Mitchell*, 463 U.S. 206, 226 (1983); *United States v. Mason*, 412 U.S. 391, 398 (1973); *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). As a result, it has allowed suits to proceed against the United States based on the breach of its fiduciary duties. *Mitchell*, 463 U.S. at 226, n.31 (citing numerous cases).

As the Court stated in *Mitchell*:

> [A] fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds). '[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.' *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (1980).

Id. at 225.

When the people of the Commonwealth approved the Covenant, they were the beneficiaries of the U.N. Trusteeship and the United States was the trustee. Using the *Mitchell* analysis, there was a trustee (United States),

beneficiaries (people of the Northern Mariana Islands), and trust corpus (all the property held in trust). In fact, the Trust Agreement expressly obligated the United States to "promote the economic advancement and self-sufficiency of the inhabitants . . . [and] protect the inhabitants against the loss of their lands and resources. . . ." App. 101. The United States held all the property interests in trust on behalf of the citizens of the Trust Territory. App. 99. In addition, the Ninth Circuit has previously ruled that "the rights asserted by the plaintiffs [under the U.N. Trusteeship Agreement] are judicially enforceable." *People of Saipan v. United States Department of Interior*, 502 F.2d 90, 98 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975).

As a result, applying the law regarding trusts, the United States has the burden to show that the people of the Commonwealth knowingly transferred the submerged lands. *See* Restatement of the Law of Restitution, Section 191, Cmt. A; *see also Edwards v. Miller*, 378 N.E.2d 583, 587 (Ill. App. 1978). Under the common law of trusts, any action taken by the trustee in violation of a fiduciary obligation is presumptively void. *See Atwood v. Newmont Gold Co.*, 45 F.3d 1317, 1323 (9th Cir. 1995); George T. Bogert, *Trusts*, § 95, at 341-42 (6th ed. 1987). Moreover, in addition to the trustee's duty to protect the trust property against damage or destruction, the trustee "is obligated to the beneficiary to do all acts necessary for the preservation of the trust res. . . ." George T. Bogert, *The Law of Trust and Trustees*, § 582, at 346 (2d ed. 1980).

The United States cannot make the required showing that the people of the Commonwealth knowingly transferred their submerged lands to the federal government and the panel did not even try to explain how it could. There is no evidence in the record that the people knew

the United States' position or the relevant material facts. In signing the Covenant, the United States did not mention *United States v. California*, 332 U.S. 19 (1947) or its progeny or even assert once that the Commonwealth would have no interest whatsoever in the submerged lands. And there is no indication in the text of the document of this massive alleged transfer.

The panel's decision that the trustee relationship was meaningless for interpreting the Covenant is contrary to the prior holding of this Court that such trust relationships create judicially enforceable rights. The Court should resolve this conflict between its precedent and that of the Ninth Circuit regarding the obligations of the United States under the trusteeship and the implications that flowed from that relationship.

C. The Proceeding Involves A Question Of Exceptional Importance, In That The Result, If Undisturbed, Will Result In The Commonwealth Having No Ownership Of The Oceanic Submerged Lands That Connect And Bind Its Islands.

The instant petition should be granted. Even the Ninth Circuit "recognize[d] the importance of the submerged lands surrounding the CNMI to the culture, history and future of the Northern Mariana Islands." App. 17. If the Ninth Circuit's decision is not changed, a tragedy will result. The people of the Commonwealth will be divested not only of almost all their property, but also their cultural identity.

There are almost no natural land-based resources within the Commonwealth and there is a long history of dependence on the ocean resources in the history of this

island community. As a result, the people's identity is completely intertwined with the marine resources the United States now unjustly attempts to take. Review of the Court of Appeals decision through a writ of certiorari will yield a result for these litigants and for others that conform to the teachings of the Supreme Court and that preserves fundamental notions of ordered government.

Date: October 6, 2005.

Respectfully submitted,

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399 F.3d 1057

United States Court of Appeals,
Ninth Circuit.
Commonwealth of the NORTHERN MARIANA ISLANDS, Plaintiff-counter-claim-defendant-Appellant,

v.

UNITED STATES of America, Defendant-counter-claimant-Appellee.
No. 03-16556.

Argued and Submitted Nov. 2, 2004.
Filed Feb. 24, 2005.

James D. Livingstone, Assistant Attorney General, Saipan, MP, for the plaintiff-counter-claim-defendant/appellant.

David C. Shilton, United States Department of Justice, Washington, DC, for the defendant-counter-claimant/appellee.

Appeal from the United States District Court for the District of the Northern Mariana Islands, Alex R. Munson, Chief District Judge, Presiding. D.C. No. CV-99-00028-ARM.

Before BEEZER, GRABER, and BYBEE, Circuit Judges.

BEEZER, Circuit Judge.

This appeal addresses ownership rights to the submerged lands off the shores of the Commonwealth of the Northern Mariana Islands [hereinafter "CNMI" or "Commonwealth"]. The CNMI filed this quiet title action against the United States, requesting declaratory and

injunctive relief to establish the CNMI as the owner of the submerged lands underlying the "internal," "archipelagic," and "territorial" waters adjacent to the Commonwealth. The United States counterclaimed on the title dispute and further sought a judgment decreeing two laws passed by the CNMI legislature to be unenforceable assertions of the Commonwealth's ownership of the submerged lands.

The district court entered summary judgment in favor of the United States. The CNMI now appeals. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

I

The CNMI is a commonwealth government comprised of sixteen islands in the West Pacific.[1] Through a Covenant agreement with the United States, the CNMI is under the sovereignty of the United States but retains the "right of local self-government." Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America §§ 101, 103, Pub.L. No. 94-241, 90 Stat. 263 (1976), *reprinted in* 48 U.S.C. § 1801 note [hereinafter "Covenant"]. As in previous opinions, *see, e.g., United States ex rel. Richards v. De Leon Guerrero*, 4 F.3d 749, 751-52 (9th Cir.1993), we briefly summarize below the history of the relationship between the United States and the people of the islands included in the Commonwealth in order to provide the legal background for this lawsuit.

[1] The Northern Marianas are in the same geographic chain of islands as Guam (which is the "Southern" Mariana). Stanley K. Laughlin, Jr., *The Law of United States Territories and Affiliated Jurisdictions* § 21.1 (1995).

App. 3

A

Following World War II, the United Nations established the "Trust Territory of the Pacific Islands" [hereinafter "TTPI"] over Micronesian islands in the Pacific. The United States "was not a sovereign over, but a trustee for the [TTPI]." *Wabol v. Villacrusis*, 958 F.2d 1450, 1458 (9th Cir.1992). The "paramount duty of the United States was to steward Micronesia to self government." *Temengil v. Trust Territory of the Pacific Islands*, 881 F.2d 647, 649 (9th Cir.1989) (discussing Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, United States-United Nations, art. 6, 61 Stat. 3301, T.I.A.S. No. 1665). Inhabitants of the TTPI formed a Congress in 1965 to discuss the future political alignment of the islands. *See* Stanley K. Laughlin, Jr., *The Law of United States Territories and Affiliated Jurisdictions* § 22.3 (1995). Representatives from one sub-group of islands, the Northern Marianas, favored establishing closer ties with the United States than representatives from the other islands. Ultimately, a delegation from the Northern Marianas entered into independent negotiations with the United States. The Covenant formed out of those talks. In 1975, the Northern Mariana Islands legislature unanimously approved the Covenant and 78.8% of voters in the Northern Marianas ratified the agreement in a plebiscite vote. *See De Leon Guerrero*, 4 F.3d at 751. Congress enacted the Covenant into law in 1976. Pub.L. No. 94-241, 90 Stat. 263 (1976).

The Covenant's ten articles detail the political relationship between the United States and the CNMI. Of particular relevance here is Article I. In addition to guaranteeing the Commonwealth the right of local self-government under the sovereignty of the United States, *see* Covenant §§ 101, 103, Article I provides that the

Covenant, "together with those provisions of the Constitution, treaties, and laws of the United States applicable to the Northern Mariana Islands, will be the supreme law of the Northern Mariana Islands." *Id.* § 102. Article I also establishes that the United States has "complete responsibility for and authority with respect to matters relating to foreign affairs and defense." *Id.* § 104.

Articles V, VIII and X of the Covenant also play central roles in this dispute. Pursuant to Article V, only certain provisions within the United States Constitution and other federal laws are applicable to the Commonwealth. *See id.* §§ 501, 502. Article VIII addresses distribution of "Property" within the Northern Marianas. In relevant part, Section 801 specifies that:

> All right, title, and interest of the Government of the Trust Territory of the Pacific Islands in and to real property in the Northern Mariana Islands on the date of the signing of this Covenant or thereafter acquired in any manner whatsoever will, no later than upon the termination of the Trusteeship Agreement, be transferred to the Government of the Northern Mariana Islands.

Finally, Article X controls how and when the provisions of the Covenant come into force. *Id.* § 1003. Some provisions, including Section 801's transfer of property, became effective immediately upon the Covenant's approval. *See id.* § 1003(a). Others, such as the right to local self-government, *id.* § 103, required the additional approval of the Covenant's Constitution, which occurred in 1978. *See id.* § 1003(b); *Temengil*, 881 F.2d at 650. The remainder became effective after the official termination of the trusteeship in 1986. *See Sagana v. Tenorio*, 384 F.3d 731, 733-34 (9th Cir.2004), *petition for cert. filed*, 73

U.S.L.W. 3355 (U.S. Dec. 6, 2004) (No. 04-774). Included in this last category are the provisions establishing United States sovereignty and authority over foreign affairs and defense of the Commonwealth. Covenant §§ 101, 104.

B

The CNMI brought this action under the Quiet Title Act, 28 U.S.C. § 2409a, requesting a declaration that the Commonwealth holds title to, or for an order mandating that the United States quitclaim any interests in, the submerged lands "underlying the internal waters, archipelagic waters, and territorial waters adjacent to the Northern Mariana Islands." The CNMI further requested the court to enjoin the United States from claiming ownership of the submerged lands. The United States counterclaimed. After resolution of some procedural hurdles,[2] both parties filed for summary judgment. The district court granted the United States' motion, declaring that the "United States possesses paramount rights in and powers over the waters extending seaward of the ordinary low water mark of the Commonwealth Coast and the lands, minerals, and other things of value underlying such waters."[3] The court also declared that the CNMI's Marine

[2] The CNMI filed two "largely identical" actions, one in 1997 and the present suit in 1999. The 1997 action did not comply with provisions of the Quiet Title Act applicable only to states; the present 1999 action did. In *Northern Mariana Islands v. United States*, 279 F.3d 1070, 1071 (9th Cir.2002), we held that because the CNMI must be treated as if it were a state for purposes of the Quiet Title Act, the CNMI qualified for the state exemption to the Act's time-bar provision.

[3] The district court did "not address [the] aspect of the Commonwealth's complaint" involving submerged lands under "internal" waters because the United States did not contest ownership of these submerged lands. *Northern Mariana Islands v. United States*, 2003 WL

(Continued on following page)

Sovereignty Act of 1980, 2 N. Mar. I.Code §§ 1101-1143 (1999), and Submerged Lands Act, 2 N. Mar. I.Code §§ 1201-1231 (1999), were preempted by federal law. This appeal followed.

II

We review de novo the district court's decision to grant or deny summary judgment. *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir.2004) (reviewing grant of summary judgment); *Lee v. Gregory*, 363 F.3d 931, 932 (9th Cir.2004) (reviewing an appealable denial of summary judgment). Summary judgment is proper when, viewing the evidence in the light most favorable to the nonmoving party, there are no genuine issues of material fact and the court determines that the district court correctly applied the substantive law. *Olsen*, 363 F.3d at 922. We may affirm on any ground supported by the record. *Id.*

The district court properly granted summary judgment to the United States on the basis of the federal paramountcy doctrine. This doctrine instructs that the United States, as a "function of national external sovereignty," acquires "paramount rights" over seaward submerged lands. *United States v. California*, 332 U.S. 19, 34, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947). Because the United States did not expressly cede its paramount rights to the submerged lands at issue here, summary judgment in favor of the United States was proper.

22997235, at *15 n. 16 (2003) (order granting United States' motion for summary judgment). We likewise limit our analysis to the submerged lands addressed by the district court's summary judgment.

A

We discussed the origins of the paramountcy doctrine in *Native Village of Eyak v. Trawler Diane Marie, Inc.*, 154 F.3d 1090, 1092-95 (9th Cir.1998) (*Eyak I*). We briefly review that history here. The Supreme Court established the paramountcy doctrine through a series of cases between the federal government and shoreline states. In *California*, the Court held that the national government had paramount rights to submerged lands off the shores of states created from former United States territories. 332 U.S. at 38, 67 S.Ct. 1658. The Court based its decision on theories of national interest and defense, concluding that because the sea had customarily been within the realm of international law, the federal government had an overriding interest in maintaining authority over these areas that were subject to international dispute and settlement. *Id.* at 34-36, 67 S.Ct. 1658. As the Court explained a few years later in *United States v. Louisiana*, 339 U.S. 699, 704, 70 S.Ct. 914, 94 L.Ed. 1216 (1950):

> The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.

The Supreme Court has extended this doctrine to apply, presumably, to all coastal states. In *United States v. Texas*, 339 U.S. 707, 717-19, 70 S.Ct. 918, 94 L.Ed. 1221 (1950), the Court held on the basis of "equal footing" and national interest principles that even a state previously possessing both "*dominium*" (ownership) and "*imperium*" (governmental powers and sovereignty) over its marginal

sea as an independent sovereign lost that authority upon entry into the Union. *See id.* at 719, 70 S.Ct. 918 ("[A]lthough *dominium* and *imperium* are normally separable and separate, this is an instance where property interests are so subordinated to the rights of sovereignty as to follow sovereignty.") (footnote omitted). A quarter-century later, the Court again invoked national interest principles to establish in *United States v. Maine*, 420 U.S. 515, 519, 95 S.Ct. 1155, 43 L.Ed.2d 363 (1975), that the federal government had paramount rights to submerged lands off the coasts of even Atlantic states that claimed to be successors in title to the original colonies.[4]

Although the Supreme Court's paramountcy decisions all involved states as parties, "the paramountcy doctrine is *not* limited merely to disputes between the national and state governments." *Eyak I*, 154 F.3d at 1095. We held in *Eyak I* that a claim of exclusive aboriginal title to submerged lands was inconsistent with the paramountcy doctrine.[5] We reasoned that "[a]ny claim of sovereign right or title over the ocean by any party other than the United States, including Indian tribes, is equally repugnant to the principles established in the paramountcy cases." *Id.*

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[4] Connecticut was not a defendant in *Maine*, "apparently because that State borders on Long Island Sound, which is considered inland water rather than open sea." *Maine*, 420 U.S. at 517 n. 1, 95 S.Ct. 1155.

[5] We granted initial en banc hearing of the appeal in the subsequent litigation in *Eyak Native Village. Eyak Native Vill. v. Daley*, 364 F.3d 1057 (9th Cir.2004). The en banc panel vacated the district court's grant of summary judgment and remanded with instructions, while retaining jurisdiction over all future proceedings related to that litigation. *Eyak Native Vill. v. Daley*, 375 F.3d 1218 (9th Cir.2004) (en banc) (*Eyak II*). The en banc proceedings left undisturbed this court's decision in *Eyak I*.

The national interest principles that support the paramountcy doctrine do provide some limitation on its scope. The doctrine does not apply to land under "inland navigable waters such as rivers, harbors, and even tidelands down to the low water mark." *California*, 332 U.S. at 30, 67 S.Ct. 1658 (discussing *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 11 L.Ed. 565 (1845)). This limitation reflects the different concerns present with "internal" and "external" submerged lands: the state interest diminishes, and the national interests increases, as the land in question moves further into the open sea. *See id.* at 29-35, 67 S.Ct. 1658.

B

Allegiance to the paramountcy doctrine compels us to begin with the presumption that the United States acquired paramount rights to the disputed submerged lands off the CNMI's shores as a function of sovereignty. As we have held in *Eyak I*, the underlying principles of this doctrine apply "with equal force" to relationships other than that between states and the federal government. 154 F.3d at 1096. Through the Covenant, the Commonwealth agreed to United States sovereignty and received (among other benefits) protection and security in return. As the Court recognized in *California*, the United States' foreign affairs obligations demand that the national government have authority to control areas of national concern. *See* 332 U.S. at 35-36, 67 S.Ct. 1658. Absent an express indication to the contrary, we will not presume the parties intended a different arrangement here.

The CNMI principally challenges the reliance on the paramountcy cases for two reasons.[6] First, the Commonwealth contends that the paramountcy doctrine is inconsistent with the Covenant's limitations on the application of federal law to the CNMI. Second, the CNMI argues alternatively that the Covenant's transfer of real property creates a "recognized exception" to the paramountcy doctrine. We disagree on both counts.

1

The CNMI first asserts that the unique relationship between the United States and the CNMI makes the paramountcy doctrine inapplicable. According to the CNMI, federal law applies to the Commonwealth only to the extent that it is consistent with the Covenant. The CNMI argues that because the rationale for the paramountcy doctrine is based on foreign commerce, foreign affairs, and national defense powers found within the United States Constitution, the doctrine cannot apply to the CNMI because the Covenant does not expressly provide the United States with this same constitutional authority over the Commonwealth.

We do not dispute that "'the authority of the United States towards the CNMI arises solely under the

[6] We are unpersuaded by the Commonwealth's other arguments as well. We do not reach whether the CNMI government may properly raise an aboriginal title claim on behalf of its native inhabitants because our decision in *Eyak I* forecloses an aboriginal title challenge to our paramountcy holding. *See* 154 F.3d at 1095-97. We also refuse to extend common law trust principles to an international agreement that constituted, on the part of the people of the Northern Mariana Islands, "a sovereign act of self-determination." *See* Covenant pmbl.

Covenant.'" *Sagana*, 384 F.3d at 734 (quoting *Hillblom v. United States*, 896 F.2d 426, 429 (9th Cir.1990)). But the CNMI's argument wrongly assumes that the paramountcy doctrine and the Covenant are inconsistent. The paramountcy doctrine draws its authority from the inherent obligations placed on the sovereign governing entity to conduct international affairs and control matters of national concern. *See California*, 332 U.S. at 35-36, 67 S.Ct. 1658; *see also Eyak I*, 154 F.3d at 1096 ("This principle applies with equal force to *all* entities claiming rights to the ocean[.]"). The Covenant unquestionably places these powers and obligations in the United States. *See* Covenant § 101 (establishing a Commonwealth "in political union with and under the sovereignty of the United States of America"); *id.* § 104 (providing the United States with "complete responsibility for and authority with respect to matters relating to foreign affairs and defense"). The CNMI's attempt to differentiate between a paramountcy doctrine based on powers found solely in the United States Constitution and one that is incorporated through the Covenant separates the doctrine from its rationale.

"'[O]nce low-water mark is passed the international domain is reached.'" *Eyak I*, 154 F.3d at 1094 (quoting *Texas*, 339 U.S. at 719, 70 S.Ct. 918). The submerged lands addressed by the district court's summary judgment fit this description. Because the Covenant places sovereignty and foreign affairs obligations in the United States, the paramountcy doctrine applies.

The CNMI next argues in the alternative that the Covenant transferred the submerged lands to the Northern Mariana Islands, thereby meeting a recognized exception to the paramountcy doctrine that allows Congress to cede its paramount authority over seaward submerged lands. The fact that the United States *may* provide the submerged lands to the CNMI does not mean it has done so here. Neither the text of the Covenant nor the actions taken by the parties during and after the negotiations lead to a conclusion that such a transaction took place.

The CNMI correctly asserts that, despite the national concerns underlying the paramountcy doctrine, Congress can transfer ownership of submerged lands to the states or other entities. Congress has done so in the past. *See, e.g.*, Submerged Lands Act of 1953, 43 U.S.C. §§ 1301, 1311 (transferring submerged lands up to three miles from shore back to the states); *see also Maine*, 420 U.S. at 525-27, 95 S.Ct. 1155 (observing that the Court held the Submerged Lands Act constitutional in *Alabama v. Texas*, 347 U.S. 272, 74 S.Ct. 481, 98 L.Ed. 689 (1954)).

The CNMI argues that the Covenant effected a similar transfer. The core of the CNMI's argument is that the transfer of "real property" in Section 801 of the Covenant includes seaward submerged lands. As noted above, Section 801 provides that "[a]ll right, title and interest of the Government of the [TTPI] in and to real property in the Northern Mariana Islands . . . will, no later than upon the termination of the Trusteeship Agreement, be transferred to the Government of the Northern Mariana Islands." Although the Covenant does not define real property, the Commonwealth notes that the Quiet Title

Act itself specifically includes disputes over "tide and submerged lands." 28 U.S.C. §§ 2409a(i)-(l). If such lands were not "real property," the Commonwealth argues, such suits could not be brought under the Quiet Title Act.

We are hesitant to ascribe an implicit intent to cede paramount rights over seaward submerged lands on this basis. There is a significant distinction between the statutory transfers relied on by the CNMI and the alleged transfer in the Covenant: the statutes cited by the Commonwealth explicitly apply to submerged lands. *See* 43 U.S.C. § 1301 (defining submerged lands); 48 U.S.C. § 749 (defining and conveying submerged lands to Puerto Rico); 48 U.S.C. § 1705 (describing and conveying submerged lands to Guam, the Virgin Islands and American Samoa). The transfer found in Hawaii's Statehood Act is also informative. In addition to transferring to the new state all lands formerly held by the Territory as well as title to certain public lands held by the United States, this act also expressly made the Submerged Lands Act applicable to the new state. *See* Pub.L. No. 86-3, 73 Stat. 4 (1959). What these statutes demonstrate is that Congress knew how to grant submerged lands when it so desired. The fact no reference to submerged lands appears in the Covenant counsels against implying such a meaning here.

Ambiguity in drafting is far from novel, even within the limited universe of paramountcy cases. California raised an argument similar to the one the CNMI makes here, arguing that the state's Enabling Act ratified a territorial boundary that included a three-mile marginal sea. *California*, 332 U.S. at 29-30, 67 S.Ct. 1658. Although the Court's opinion did not focus on this assertion, judging

from the Court's favorable decision for the United States, this argument apparently carried little weight.[7]

A strong presumption of national authority over seaward submerged lands runs throughout the paramountcy doctrine cases, and we extend that same presumption to the case at hand.[8] Absent express indication to the contrary, the ownership of seaward submerged lands accompanies United States sovereignty. The Covenant lacks such an expression.

The CNMI can point to no language in the Covenant that expressly addresses submerged lands. Instead, the Commonwealth urges us to consider the expansive records of the Covenant's negotiations and history to extract the agreement's meaning. The district court's analysis of the extrinsic evidence relied on by the Commonwealth is persuasive. We conclude that there exists no genuine issue

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[7] In *Texas*, the Court avoided a similar issue by relying on an "equal footing" clause rationale not available here. *See* 339 U.S. at 714, 70 S.Ct. 918.

[8] We also note, but do not rely on, the general presumption inherent in public land cases that transfer of title from the federal government is not lightly inferred. *See Guam ex rel. Guam Econ. Dev. Auth. v. United States*, 179 F.3d 630, 638 (9th Cir.1999) (citing *United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 116, 77 S.Ct. 685, 1 L.Ed.2d 693 (1957)). Such a presumption does not apply with respect to grants to Native Americans. *See id.* (citing *County of Yakima v. Confed. Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992)); *but cf. United States v. Washington*, 157 F.3d 630, 645-46 (9th Cir.1998) (discussing circumstances in which the equal footing doctrine limits the implied transfer of non-oceanic submerged lands to Indian tribes). Because our decision does not rely on this general presumption, we do not find it necessary to decide whether the canons of construction applicable to Indian treaties should also apply to inhabitants of the CNMI. *Cf. Guam*, 179 F.3d at 638 (declining to decide the issue with respect to natives of Guam).

of material fact because the evidence is not "such that a reasonable jury could return a verdict for the nonmoving party." *Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 322 F.3d 1039, 1046 (9th Cir.2003) (internal quotation marks omitted). The CNMI cannot overcome the paramountcy doctrine because there is no clear intention on the part of the United States to cede its authority off the shores of the Commonwealth that it is obligated to protect.

The CNMI places substantial emphasis on two orders by the Secretary of Interior to support its position. The purpose of Secretarial Order No. 2969, 40 Fed.Reg. 811 (1974), was to implement a 1973 policy statement by the United States. *Id.* at 812. The order empowered local district legislatures within the TTPI to create legal entities "to hold title to public lands within the district." *Id.* at 812. This order expressed "[l]imitations" on the transfer of, *inter alia*, "submerged lands." *Id.* It required the local legislatures to reserve "the right of the central government of the [TTPI] to regulate all activities affecting conservation, navigation, or commerce in and to the navigable waters and tidelands, filled lands, submerged lands and lagoons." *Id.* at 812. As the district court found, this order was not even implemented in the Northern Mariana Islands.

Secretarial Order No. 2989, 41 Fed.Reg. 15,892 (1976), applied solely to the Northern Marianas and became effective shortly after the Covenant's approval. The order addressed the interim governing trust administration of the Northern Marianas. One of its provisions transferred title to "public lands" from the TTPI to another administrator, the United States "Resident Commissioner." *Id.* at 15896. There is no indication in this order that the United

States contemplated a permanent divestment of the paramount rights that the United States would obtain upon assuming sovereignty. Under the terms of the Covenant, the United States did not obtain that sovereignty until after the termination of the trust relationship. *See* Covenant § 1003. Read in context of the Covenant, Order 2989 demonstrates at most the recognition by the United States that the paramountcy doctrine could not apply until the United States acquired that sovereignty.

Other extrinsic evidence further erodes the CNMI's claim. Position papers by the Commonwealth have, on prior occasions, described the Covenant's lack of discussion about submerged lands as a "curious blind spot" within the agreement. We have relied in previous opinions on the Marianas Political Status Commission's "authoritative" "Section-by-Section Analysis of the Covenant" to assist us in discerning the meaning of the Covenant. *See Fleming v. Dep't. of Pub. Safety*, 837 F.2d 401, 408 (9th Cir.1988), *overruled on other grounds, DeNieva v. Reyes*, 966 F.2d 480, 483 (9th Cir.1992); *see also Sagana*, 384 F.3d at 734 (referencing the Analysis). Like the Covenant itself, this Analysis does not address submerged lands, shedding no light on this issue.

The official[9] analysis to the CNMI Constitution does not help the Commonwealth's position, either. This document acknowledges that the United States "has a claim to the submerged lands off the coast of the Commonwealth"

[9] We have previously noted that the Northern Mariana Islands' Constitutional Convention officially adopted this analysis. *See Sablan v. Santos*, 634 F.2d 1153, 1154 (9th Cir.1980), *superseded by statute on other grounds as recognized by Gioda v. Saipan Stevedoring Co.*, 855 F.2d 625, 628-29 (9th Cir.1988).

based on the paramountcy doctrine. It explains that the CNMI's Constitution "recognizes this claim and also recognizes that the Commonwealth is entitled to the same interest in the submerged lands off its coasts as the United States grants to the states." Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands 144 (Dec. 6, 1976). We agree. Absent express language to the contrary, the CNMI is entitled to the same interest in the seaward submerged lands as that of the states when they submitted to the sovereignty of the United States. As the paramountcy cases established, that state interest is inferior to the federal rights. Although states have acquired greater control over submerged lands through congressional action, no similar legislation has provided analogous rights to the CNMI.

3

As the CNMI acknowledges, when the people of the Northern Mariana Islands and the United States entered into the Covenant agreement in 1975, "both parties had reason to seek a union." Both parties received benefits from this agreement. That the newly formed Commonwealth subsequently objected to the loss of title to submerged lands as result of agreeing to United States sovereignty is as unavailing to the CNMI as that same argument was to states in *California, Texas, Louisiana* and *Maine*. The CNMI's position is even less persuasive given that the Covenant was negotiated after the paramountcy doctrine had become well-settled law.

We recognize the importance of the submerged lands surrounding the CNMI to the culture, history and future of the Northern Mariana Islands. We also trust that the

Supreme Court was cognizant of the similar importance of submerged lands to coastal states. *See, e.g., California*, 332 U.S. at 40, 67 S.Ct. 1658. The Supreme Court established the paramountcy doctrine in spite of these circumstances, leaving it to Congress to provide remedies for the states if it so chose. That same avenue is available here.

III

The Commonwealth admits that its Submerged Lands Act, 2 N. Mar. I.Code §§ 1201-1231,[10] and Marine Sovereignty Act of 1980, 2 N. Mar. I.Code §§ 1101-1143,[11] "combine to assert the Commonwealth's ownership of the submerged lands" in dispute. Because we hold that the United States has paramount rights to the submerged lands at issue here, *see supra*, a declaration of ownership (or sovereignty) over these submerged lands is directly contrary to federal law. *See Texas*, 339 U.S. at 719, 70

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[10] The Commonwealth's Submerged Lands Act controls the management of submerged lands owned by the CNMI. The CNMI legislature declared through this act, as amended, that the CNMI government has authority over "all submerged lands in the Northern Mariana Islands." *See* PL 6-13 § 1 (1988) (codified as amended 2 N. Mar. I.Code § 1201 note).

[11] The Marine Sovereignty Act of 1980 declares "that the sovereignty of the Commonwealth extends beyond its land area to its internal waters, archipelagic waters, and territorial sea." 2 N. Mar. I.Code § 1114(a). The territorial sea has an outer limit of 12 miles from the "baseline" (the line segment designating the border of the archipelagic waters). *Id.* § 1123. This Act also declares that the CNMI has "sovereign rights" in an "exclusive economic zone," which is the area of sea immediately beyond the territorial sea, generally to a distance of 200 miles from the baseline. *Id.* §§ 1114(b), 1124. The Act also provides that it does not "impose any impediment to any lawful action taken by the government of the United States for the defense and security of the Commonwealth or of the United States." *Id.* § 1136.

S.Ct. 918 ("[T]his is an instance where property interests are so subordinated to the rights of sovereignty as to follow sovereignty."). The district court properly held that the Commonwealth's Submerged Lands Act and Marine Sovereignty Act of 1980 are preempted by federal law. *Cf. Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941) ("Our primary function is to determine whether . . . [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.").

IV

We hold that the United States acquired paramount interest in the seaward submerged lands, as defined by the Supreme Court in *California*, found off the shores of the Commonwealth of the Northern Mariana Islands.[12] Laws passed by the CNMI legislature to the contrary are inconsistent with the paramountcy doctrine and are preempted by federal law. The district court's grant of summary judgment for the United States is AFFIRMED.

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[12] We express no opinion as to the specific contours of the boundaries of these waters and we do not read the district court's summary judgment as doing so, either. *Cf. California*, 332 U.S. at 26, 67 S.Ct. 1658 ("[T]here is no reason why, after determining in general who owns the three-mile belt here involved, the Court might not later, if necessary, have more detailed hearings in order to determine with greater definiteness particular segments of the boundary.").

District Court for the Northern Mariana Islands.
COMMONWEALTH of the Northern Mariana Islands, Plaintiff and Counterclaim Defendant v.
UNITED STATES OF AMERICA, Defendant and Counterclaim Plaintiff No. Civ.A. 99-0028.

Aug. 8, 2003.

JUDGMENT

MUNSON, J.

FOR THE REASONS stated in the August 7, 2003, order, NOW, THEREFORE,

IT IS ORDERED, ADJUDGED, AND DECREED that judgment shall be entered in favor of defendant and against plaintiff on defendant's counterclaim; and,

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the United States possesses paramount rights in and powers over the waters extending seaward of the ordinary low water mark of the Commonwealth coast and the lands, minerals, and other things of value underlying such waters; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Commonwealth's "Marine Sovereignty Act," 2 N.Mar.I.Code § 1101 *et seq.*, and "Submerged Lands Act," 2 N.Mar.I.Code § 1201 *et seq.*, are preempted by federal law and are of no force and effect.

2003 WL 22997235 (D.N.Mar.I.)

District Court for the Northern Mariana Islands.
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, Plaintiff and Counterclaim Defendant
v.
UNITED STATES OF AMERICA,
Defendant and Counterclaim Plaintiff
No. Civ.A. 99-0028.

Aug. 7, 2003.

Taijeron, Joseph L.G. Jr., Assitant Attorney General, Saipan, for Plaintiff.

Gregory Baka, Assistant United States Attorney, United States Attorneys Office, Saipan, for Defendent.

ORDER DENYING COMMONWEALTH'S MOTION FOR SUMMARY JUDGMENT, GRANTING UNITED STATES' MOTION FOR SUMMARY JUDGMENT, and DECLARING 2 N.Mar.I.Code § 1101 *et seq.*, and 2 N.Mar.I.Code § 1201 *et seq.* PREEMPTED BY FEDERAL LAW

MUNSON, J.

THIS MATTER came before the court on Wednesday, July 16, 2003, for hearing of plaintiff/counterclaim defendant Commonwealth of the Northern Mariana Islands' ("CNMI's") motion for summary judgment and defendant/counterclaim plaintiff United States' motion for summary judgment. Plaintiff appeared by and through Commonwealth Assistant Attorneys General Joseph L.G. Taijeron, Jr., who argued, and James D. Livingstone and Robin W. Hutton on the memoranda; defendant appeared by and through Edward S. Geldermann, Senior Trial Attorney, U.S. Department of Justice, who appeared by

telephone and argued, and Assistant U.S. Attorney Gregory Baka.

THE COURT, having fully considered the voluminous filings of the parties, and having further considered the oral argument presented, rules as follows:

Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure states, in part, that judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

The party seeking summary judgment always bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the matters of record which it believes demonstrates the absence of a genuine issue of material fact. *Celotex Corporation v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

The non-moving party must set forth by affidavit or as otherwise provided in Rule 56 specific facts showing that there is a genuine issue of material fact for trial. *Kaiser Cement Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 1100, 1103-1104 (9th Cir.), *cert. denied*, 479 U.S. 949, 107 S.Ct. 435, 93 L.Ed.2d 384 (1986). All that is required from the non-moving party is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of truth at trial. *First National Bank v. Cities Service Co.*, 391 U.S.

253, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968). All inferences are drawn in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962). There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party; if the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Anderson v. Liberty Lobby*, 477 U.S. at 250-251.

A trial court may not weigh conflicting versions of fact on a motion for summary judgment. "Rule 56 calls for the judge to determine whether there exists a genuine issue for trial, not to weigh the evidence himself and determine the truth of the matter." *Baxter v. MCA, Inc.*, 812 F.2d 421, 424 (9th Cir.), *cert. denied, William v. Baxter*, 484 U.S. 954, 108 S.Ct. 346, 98 L.Ed.2d 372 (1987), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). "[A] court can only enter a summary judgment if *everything* in the record – pleadings, depositions, interrogatories, affidavits, *etc.* – demonstrates that no genuine issue of material fact exists." *Keiser v. Coliseum Properties, Inc.*, 614 F.2d 406, 410 (5th Cir.1980) (emphasis in original).

Findings of Fact[1]

1. The former Trust Territory of the Pacific Islands ("TTPI") encompassed a group of approximately 2,000 islands and atolls in the Western Pacific Ocean. *Commonwealth of the Northern Mariana Islands v. Atalig*, 723 F.2d 682, 685 n. 3 (9th Cir.1984). From the onset of World War I in 1914 until the defeat of Japan in World War II in 1945, these islands were under the control of Japan. *See Gale v. Andrus*, 643 F.2d 826, 828-30 (D.C.Cir.1980). Between 1944 and 1947, the island group was placed under the military control of the United States. On July 18, 1947, the United Nations Security Council entered into an agreement ("Trusteeship Agreement") with the United States as Trustee, pursuant to which the U.S. accepted a non-sovereign, oversight authority over the peoples of the TTPI. In that trustee capacity, the U.S. was granted full powers of administration, legislation, and jurisdiction over the Trust Territory to promote the development of the economic, social, political, and educational well-being of

[1] The district court is not required to make findings of fact and conclusions of law on a motion for summary judgment, but such findings and conclusions are helpful to the reviewing court. *See e.g. Underwager v. Channel 9 Australia*, 69 F.3d 361, 366 n. 4 (9th Cir.1995) *citing Gaines v. Haughton*, 645 F.2d 761, 768 n. 13 (9th Cir.1981), *cert. denied* 454 U.S. 1145, 102 S.Ct. 1006, 71 L.Ed.2d 297 (1982). Of course, "findings of fact" on a summary judgment are not findings in the strict sense that the trial judge has weighed the evidence and resolved disputed factual issues; rather, they perform the narrow function of pinpointing for the reviewing court those facts which are undisputed and indicate the basis for summary judgment. *All Hawaii Tours, Corp. v. Polynesian Cultural Center*, 116 F.R.D. 645 (D.Haw.1987), *reversed on other grounds*, 855 F.2d 860 (9th Cir.1988).

the TTPI's inhabitants. Joint Resolution of July 18, 1947, ch. 271, 61 Stat. 397.[2]

2. In 1965, the people of Micronesia formed the Congress of Micronesia, with representatives from each of six administrative districts: the Northern Mariana Islands ("NMI"), Yap, Truk (Chuuk), Ponape (Pohnpei) (which then included Kosrae (Kusaie)), Palau (Belau), and the Marshall Islands (hereinafter "TTPI districts"). In 1966, the TTPI districts petitioned the United States to establish a joint commission to consider the future political alternatives for the TTPI. In 1969, the Micronesian Congress began negotiations with the U.S. through a Joint Committee on Future Status. When the Congress of Micronesia rejected a U.S. proposal in May 1970 for all of the TTPI districts to enter into a "Commonwealth" relationship of "permanent association" with the United States, and elected instead to form a looser, more autonomous relationship of "free association," the Northern Mariana Islands instead sought separate negotiations directed toward a closer and more permanent political relationship

[2] Authority to administer the trusteeship was vested in the President of the United States, who was authorized to delegate that responsibility through such agency or agencies as the President directed. Section 1 of the Act of June 30, 1954, ch. 423, 68 Stat. 330 (48 U.S.C. § 1681(a)). Until 1962, the Navy Department was responsible for the civil administration of the Northern Mariana Islands (except Rota), while the Department of the Interior ("DOI") had administrative authority over the remainder of the Trust Territory Islands. Exec. Order No. 10470, July 17, 1953, 3 C.F.R. § 951 (1949-53 comp.). In 1962, civil administrative authority for the entire Trust Territory (including all of the Northern Mariana Islands) was consolidated in the Secretary of the Interior.

with the United States. *See generally U.S. ex rel. Richards v. De Leon Guerrero,* 1992 WL 321010, (D.N.M.I.).[3]

3. In 1972, the U.S. agreed to hold separate negotiations with the NMI. Toward that end, the U.S. and the NMI commenced several rounds of negotiations to determine the NMI's future political relationship with the United States *See* Exhibit Nos. 1 and 3-7 of the U.S. Exhibits In Support Of Motion For Summary Judgment ("U.S.Exh.") (For ease and uniformity of reference, citations are to the U.S.' exhibits.)

4. On May 10, 1973, prior to the second round of negotiations, James M. Wilson, U.S. Deputy Representative for Micronesian Status Negotiations, issued a memorandum in which he set forth the United States' position concerning the future status of CNMI submerged lands after the Commonwealth's political relationship between the NMI and the U.S. had become established:

> So far as submerged lands are concerned, we feel that these should vest in the future Marianas government under the new agreement, as in the case of the states of the United States and other territories.

(U.S. Exh. 2 at 7.)

The reports of the second round and subsequent rounds of negotiations between the U.S. and the NMI are

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[3] "So strong was this desire for union that at one point the then Mariana Islands District Legislature passed a resolution warning the Security Council and Trusteeship Council of the United Nations that it was prepared to secede from the TTPI, 'by force of arms if necessary,' in order to pursue a closer relationship with the United States." *U.S. ex rel. Richards v. De Leon Guerrero,* 1992 WL 321010 (D.N.M.I.1992).

silent on the subject of ownership and jurisdiction over oceanic submerged lands after the new political relationship between the U.S. and the NMI became effective. *See* U.S. Exhs. 3-7.[4]

5. Contemporaneously, throughout 1972 and beyond, the United States continued to pursue negotiations separately with the remaining Micronesian districts about their future political status.

In early 1973, representatives of Palau expressed unwillingness to participate in any further negotiations with the U.S. concerning its future political status while title to Palau land was still being held by the Trust Territory Government. (U.S. Exh. 8 at 1.) The Congress of Micronesia subsequently adopted a similar negotiating stance. *Id.* To remove this impediment to the political status negotiations, the Secretary of the Interior in November 1973 issued a policy statement, applicable to all of the Micronesian districts, concerning the return of public land to the districts. (U.S.Exh. 8.) In that statement, the Secretary stated:

> The United States Government, as administering authority in the Trust Territory of the Pacific Islands, has always considered public land in Micronesia to be property held in trust for the people of Micronesia. . . . Recently requests have been made in Palau that public land in that district be turned over now to its traditional leaders to be held in trust for the people of Palau. This position has received the support of the Palau

[4] As used herein, the term "oceanic submerged lands" is shorthand for "lands seaward of the Commonwealth's coastlines." It does not include lands underlying the Commonwealth's inland waters.

> District Legislature. Subsequently it was formally endorsed by the Congress of Micronesia's Joint Commission on Future Status and communicated to the United States Government. . . . The United States has now completed an extensive study of the problem in all districts. . . . As a result of that study, the United States has now concluded that if it is the desire of the people in a district that public lands in that district be turned over to the district now before the termination of the Trusteeship the U.S. is willing to acceed [*sic*] to their wishes and to facilitate the transfer of title. This transfer, however, must be subject to certain limitations and safeguards . . . designed to protect those individuals who have acquired property interests in public lands under the trusteeship and to meet the continuing land needs of the Trust Territory Government for public use. These limitations and safeguards will apply until the Trusteeship ends, at which time the new government will be free to modify them as it chooses.

Id. at 2.

Included among the limitations and safeguards established by the land return policy statement were that public land still needed by the Trust Territory Administration for defense purposes, and former public land conveyed to individuals pursuant to a homestead program, would not be transferred to the districts. In addition, the Trust Territory Government would "retain the right to control activities" within "tidelands, filled lands, submerged lands and lagoons" to the extent they "affect[ed] the public interest." (*Id.* at 4.)

The land return policy statement called on the Congress of Micronesia to enact legislation enabling the transfer of TTPI public lands to the TTPI districts. (*Id.* at 2.) When the Congress of Micronesia had failed to do so by late 1974, the Interior Secretary proceeded to implement the public land return policy on his own initiative by issuing Secretarial Order No. 2969, 40 Fed.Reg. 811 (1974). (U.S.Exh. 9) That order, which became effective on December 28, 1974, directed the High Commissioner of the Trust Territory to convey the Trust Territory's right, title, and interest in public lands to district legal entities that had been empowered by their respective TTPI district legislatures to receive and hold such lands. *Id.*; 40 Fed.Reg. at 812. Consistent with the land return policy statement, Secretarial Order No. 2969 went on to prohibit the High Commissioner from transferring any submerged lands to a district until its legislature enacted laws "providing for . . . reservation of the right of the central government of the Trust Territory of the Pacific Islands to regulate all activities affecting conservation, navigation, or commerce in and to the navigable waters and tidelands, filled lands, submerged lands and lagoons." *Id.*; 40 Fed.Reg. at 812.[8]

6. On February 15, 1975, just six weeks after Secretarial Order No. 2969 became effective, representatives of the Northern Mariana Islands and the United States signed the Covenant to govern the future relationship

[8] The Northern Marianas District Legislature did establish a Marianas Public Lands Corporation but it never became operational. (U.S. Exh. 15 at 142) The constitutional CNMI government later established a corporation by the same name but, by that time, Secretarial Order No. 2989 (discussed *infra*) had already superseded Secretarial Order No. 2969.

between the NMI and the United States. (U.S.Exh. 10) The NMI Legislature unanimously endorsed the Covenant, and the people of the NMI approved it by a 78% majority vote on June 17, 1975. The U.S. Congress thereafter enacted the Covenant as law. *See* Joint Resolution of March 24, 1976, Pub.L. No. 94-241, 90 Stat. 263, reprinted in 48 U.S.C. § 1801 note.

7. The Covenant consists of ten articles that define the political relationship between the NMI and the U.S. (U.S.Exh. 10.)[6] Under the Covenant, upon termination of the U.N. Trusteeship Agreement the CNMI became a self-governing commonwealth in political union with, and under the sovereignty of, the United States of America. Covenant § 101. (U.S. Exh. 10, at 5.)[7] The "Section-By-Section Analysis of the Covenant to Establish A Commonwealth of the Northern Mariana Islands"[8] ("Analysis") (Feb. 15, 1975), prepared by the Marianas Political Status Commission to accompany the Covenant, describes this sovereignty concept as follows:

> [t]he United States will have sovereignty, that is, ultimate political authority, with respect to the Northern Mariana Islands. The United States has sovereignty with respect to every state, every

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[6] The authority of the United States towards the CNMI now arises solely under the Covenant. *Hillblom v. United States*, 896 F.2d 426, 429 (9th Cir.1990).

[7] United States sovereignty over the Commonwealth was fully established as of 12:01 a.m., November 4, 1986, NMI time and date. Pres. Proc. 5564, Nov. 3, 1986, sec. 2; *Smith v. Pangilinan*, 651 F.2d 1320, 1321 (9th Cir.1981); *CNMI v. Atalig*, 723 F.2d at 685.

[8] The Section-by-Section Analysis of the Covenant has been declared authoritative by the Ninth Circuit. *Fleming v. Department of Public Safety*, 837 F.2d at 408.

> territory and the Commonwealth of Puerto Rico. United States sovereignty is an essential element of a close and enduring political relationship with the United States, whether in the form of statehood, in the traditional territorial form, or as a commonwealth.

(U.S. Exh. 11, at 7.)

8. Section 104 of the Covenant, which likewise did not become effective until termination of the Trusteeship in 1986, provides that the United States has complete responsibility for and authority with regard to foreign affairs and defense affecting the NMI. (U.S. Exh. 10, at 6.)

9. Section 102 of the Covenant, which became effective on January 9, 1978, states that the relations between the NMI and U.S. will be governed by the Covenant which, together with the provisions of the Constitution, treaties and the laws of the United States applicable to the NMI, will be the supreme law of the NMI. *Id.* at 5-6. As the Analysis explained:

> [Section 102] is similar to Article VI, clause 2 of the Constitution of the United States, which makes the Constitution, treaties and laws of the United States the supreme law in every state of the United States. This means that federal law will control in the case of a conflict between local law (even a state's constitution) and a valid federal law. Federal law is also supreme, of course, in the territories and the Commonwealth of Puerto Rico.

Analysis at 10; S.Rep. No. 94-433, 94th Cong. 1st Sess. 65, 66 (1975); 1975 U.S.Code, Cong., & Admin. News 448. (U.S. Exh. 11, at 10.)

10. Section 103 of the Covenant, also effective January 9, 1978, guarantees the people of the NMI the "right of local self-government" and the right to govern themselves "with respect to internal affairs in accordance with a Constitution of their own adoption." (U.S. Exh. 10, at 6.) Complementing Covenant § 103, § 201 of the Covenant required the people of the Northern Mariana Islands to "formulate and approve a Constitution." *Id.* at 7.

11. Article VIII of the Covenant is entitled "Property." Section 801 of the Covenant provides, as relevant here:

> [a]ll right, title and interest of the Government of the Trust Territory of the Pacific Islands in and to real property in the Northern Mariana Islands on the date of the signing of this Covenant or thereafter acquired in any manner whatsoever will, no later than upon the termination of the Trusteeship Agreement, be transferred to the Government of the Northern Mariana Islands.

(U.S. Exh. 10, at 28.)

Sections 802 and 803 of the Covenant provided that the CNMI would lease to the United States specified acreage – including "immediately adjacent" waters – on, *inter alia*, Tinian and Farallon de Medinilla Islands for fifty years (with an option to renew for an additional 50 years) at specified U.S. dollar amounts. *Id.* at 29-30.

12. On the same day the Covenant became federal law, March 24, 1976, the Acting Secretary of the Interior issued Secretarial Order No. 2989, 41 Fed.Reg. 15,892 (1976), which established a separate civil administration for the Northern Marianas, wholly distinct from the Trust Territory governance of the other Micronesian districts, to

be effective until such time as the President of the United States issued a Proclamation pursuant to Section 1003(b) of the Covenant. (U.S.Exh. 12.)[9]

Secretarial Order No. 2989 established for the Northern Marianas the position of "Resident Commissioner," whose task was to oversee the broad range of executive and legislative responsibilities of the new civil administration in the Marianas. *Id.;* 41 Fed.Reg. at 15,893.

With respect to TTPI public lands, Secretarial Order No. 2989 provided, in pertinent part:

> Title to public lands of the Trust Territory of the Pacific Islands which are situated in the Northern Mariana Islands and which are actively used by the Trust Territory Government is hereby transferred to and vested in the Resident Commissioner subject to the continued use of such land by the Trust Territory Government until relocation of the capital of the Trust Territory of the Pacific Islands. . . . All other public lands situated in the Northern Mariana Islands title to which is now vested in the Trust Territory Government and which have not been transferred to the legal entity created by the Mariana Islands District Legislature according to Secretary of the

[9] Section 1003(b) of the Covenant provides that "Sections 102, 103, 204, 304, Article IV, Sections 501, 502, 505, 601-605, 607, Article VII, Sections 802-805, 901 and 902 [of the Covenant] will become effective on a date to be determined and proclaimed by the President of the United States which will be not more than 180 days after this Covenant and the Constitution of the Northern Mariana Islands have both been approved." (U.S. Exh. 10, at 39.) That date turned out to be January 9, 1978.

> Interior Order No. 2969 shall vest in the Resident Commissioner.

Id.; 41 Fed.Reg. at 15,895.

13. As noted above, Section 201 of the Covenant required the people of the Northern Mariana Islands to "formulate and approve a Constitution." (U.S. Exh. 10, at 7.) From October to December 1976, the NMI Constitutional Convention gathered, drafted, and approved a constitution, (U.S.Exh. 13.), which on March 6, 1977, was ratified by a 92% majority vote. The Constitution was deemed approved by Presidential Proclamation No. 4534 on October 4, 1977, *see* U.S. Exh. 14, and the constitutional government of the Northern Mariana Islands became effective on January 9, 1978.[10]

14. The drafters of the NMI Constitution adopted several constitutional provisions of particular importance to this case.

Article XI, § 1, of the NMI Constitution provides, in pertinent part, that "the submerged lands off the coast of the Commonwealth to which the Commonwealth now or hereafter may have a claim of ownership under U.S. law are public lands and belong collectively to the people of the Commonwealth who are of Northern Marianas descent." (U.S. Exh. 13, at 19.)

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[10] Pursuant to Sections 1003(b) and 1004(b) of the Covenant, the NMI Constitution and Section 502 of the Covenant were to become effective on a date specified by the President of the United States In Proclamation No. 4534 (U.S. Exh. 14, at 56, 594), then President Carter designated January 9, 1978, as the date on which both the Constitution and Covenant § 502 would become effective.

Article XI, § 2, provides that the "management and disposition of submerged lands off the coast of the Commonwealth shall be as provided by law." *Id.*

Article XI, § 3 provides that "the management and disposition of public lands except those provided for by § 2 [*i.e.*, submerged lands] shall be the responsibility of the Marianas Public Land Corporation" established by CNMI Const. Art. XI, § 4. *Id.* at 19-20.

Finally, Article XIV, § 1 of the CNMI Constitution provides that:

> The marine resources in waters off the coast of the Commonwealth over which the Commonwealth now or hereafter may have any jurisdiction under United States law shall be managed, controlled, protected, and preserved by the [Marianas] legislature for the benefit of the people.

(U.S. Exh. 13, at 23.)

In an *Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands* (*"CNMI Constitutional Analysis"*), formally adopted by the NMI Constitutional Convention on December 6, 1976, the Northern Marianas framers explained the intent behind Article XI of the Constitution:

> [Article XI] Section 1 includes all submerged lands to which the Commonwealth now or at any time in the future may have any right, title or interest. The United States is the owner of submerged lands off the coasts of the states under territorial waters. The states have no rights in these lands beyond that transferred by the United States. The federal power over these lands is based on the provisions of the United

> States Constitution with respect to defense and foreign affairs. Under article 1, section 104 of the Covenant, the United States has defense and foreign affairs powers with respect to the Commonwealth and thus has a claim to the submerged lands off the coast of the Commonwealth as well. Section 1 recognizes this claim and also recognizes that the Commonwealth is entitled to the same interest in the submerged lands off its coasts as the United States grants to the states with respect to the submerged lands off their coasts. Under this section, any interest in the submerged lands granted to the states or to the Commonwealth in the future also will become part of the public lands of the Commonwealth.

(U.S. Exh. 15, at 144.)

15. Explaining the scope of Article XIV, § 1 of the CNMI Constitution, entitled "Marine Resources," the framers stated in the *CNMI Constitutional Analysis:*

> This section provides that the marine resources found in waters off the coast of the Commonwealth over which the Commonwealth has jurisdiction shall be managed, controlled, protected, and preserved by the legislature for the benefit of the people of the Commonwealth. Marine resources are those resources found in the water such as fish, dissolved minerals, plant life suspended in the water and other resources. Marine resources do not include resources found on or under submerged lands. Those resources are public lands and are provided for by Article XI, section 2.
>
> The jurisdiction of the Commonwealth over the waters off the coast is the same as that of the states. Currently the states have the power to

> regulate fisheries within territorial waters as part of the police powers. The power of the states extends only to what the United States claims as territorial waters. Depending on the claims asserted by the United States and United States law with respect to these waters, the jurisdiction of the Commonwealth might be extended. This section provides that the legislature has the power to control marine resources for whatever distance into the ocean is available under United States law.

Id. at 181.

16. Almost immediately after the NMI constitutional government became effective in January, 1978, questions arose as to the NMI government's authority to regulate submerged lands and marine resources off the coast of the Commonwealth, at least until the end of the Trusteeship. Contributing to the uncertainty was the fact that § 1003(b) of the Covenant (U.S. Exh. 10, at 39) implemented different sections of the Covenant in three phases. Thus, real property provisions of Sections 801 of the Covenant (calling for return of TTPI real property to the NMI government no later than termination of the Trusteeship) became effective at the beginning of the first phase, which commenced on March 24, 1976. The leasing provisions of Covenant §§ 802 and 803 became effective at the beginning of the second phase, on January 9, 1978. And the sovereignty, foreign affairs, and defense provisions of §§ 101 and 104 of the Covenant became effective in the third phase, which began when the Trusteeship ended on November 4, 1986. *See* U.S. Exh. 10, at 39. Consequently, at least from January, 1978, through November, 1986, doubts and/or disagreements surfaced by and between representatives of the CNMI and the U.S. over the extent

to which the CNMI was empowered to regulate submerged lands and marine resources off the coast of the Commonwealth.

17. On January 11, 1978, two days after the second phase of the Covenant (including Covenant § 502(a)(2)) became effective,[11] the U.S. Department of State published a notice in the *Federal Register,* 43 Fed.Reg. 1658 (1978) (U.S.Exh. 16) declaring that the U.S. government had established a 200-mile fishery conservation zone near the NMI "within which the United States will exercise its exclusive fishery management authority as set forth in the Fishery Conservation and Management Act of 1976." (U.S. Exh. 16; 43 Fed.Reg. at 1658.) The *Federal Register* notice went on to state that "the seaward limit of the fishery conservation zone is 200 nautical miles from the baseline from which the breadth of the territorial sea is measured, except that to the north of the Northern Mariana Islands, the limit of the fishery conservation zone shall be determined by straight lines" connecting geographical coordinates specified in the notice. *Id.* Although the NMI government shortly thereafter protested this assertion of fishery management jurisdiction by the United States, it was ultimately confirmed by the Ninth Circuit as a lawful exercise of United States authority under § 502(a)(2) of the Covenant. *Hillblom v. United States of America,* 896 F.2d 426, 431 n. 3 (9th Cir.1990).

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[11] Section 502(a)(2) of the Covenant (U.S. Exh. 10, at 14-15) provides that the "laws of the United States in existence on the effective date of this Section and subsequent amendments to such laws will apply to the Northern Mariana Islands" to the extent that they are "applicable to Guam and which are of general application to the several States as they are applicable to the several States."

18. On June 9, 1978, five months after the CNMI Constitution became effective, Oscar C. Rasa, then Speaker of the NMI's House of Representatives wrote to Ruth G. Van Cleve, Director of the Department of Interior's ("DOI's") Office of Territorial Affairs ("OTA"), explaining that several firms had recently contacted CNMI legislators seeking authorization to conduct preliminary exploration to determine the feasibility of extracting minerals from submerged lands abutting the NMI's shorelines. (U.S.Exh. 17.) According to Mr. Rasa's letter, the firms had "been advised informally that the Commonwealth of the Northern Mariana Islands may not have exclusive jurisdiction over submerged lands off the coast of the Commonwealth." *Id.* at 1. While asserting the NMI legislature's position that the NMI owned the submerged lands and resources underlying the territorial sea, and could "manage and dispose of same by law," the Rasa letter nonetheless asked DOI's OTA for a legal opinion whether jurisdiction over submerged lands and ocean resources was vested exclusively in the Commonwealth. *Id.*

On June 22, 1978, Ms. Van Cleve referred the Speaker's letter to C. Brewster Chapman, Jr., Asst. Solicitor for DOI's Division of General Law – Territories. (U.S.Exh. 18.) By letter dated June 29, 1978 (U.S.Exh. 19), Mr. Chapman responded that:

> [T]he Government of the Northern Mariana Islands probably has ownership of and exclusive jurisdiction over these submerged lands, at least at this time. But this is only a temporary title and jurisdiction. When the Northern Mariana Islands are proclaimed a Commonwealth and territory of the United States, the laws of the United States applicable to its territories will come into effect in the Northern Marianas. One of the rules

> . . . is that submerged lands around an island territory belong to the federal – not to the local – Government.
>
> By the 1974 amendments to the Territorial Submerged Lands Act . . . , the Congress has clearly indicated its intent that, subject to the limitations contained in that Act, title to the submerged lands surrounding our territories should be in the respective local governments, and there is absolutely no reason to believe that the Northern Mariana Islands will not eventually be included under the provisions of that Act. In fact, I would recommend seeking a legislative amendment to the Territorial Submerged Lands Act now but for one problem. That Act conveys all right, title, and interest of the United States in those submerged lands to the respective named territories. The United States does not now have any right, title or interest in the submerged lands of the Northern Mariana Islands and, therefore, has nothing to convey. Such right, title, or interest will only attach as an incidence of U.S. sovereignty when the Northern Marianas become a territory of the United States. At that time, then, the grant can be made.

Id. at 2-3.

Consistent with its conclusion that oceanic submerged lands abutting the NMI would belong to the Federal Government as soon as the NMI became a Commonwealth of the United States, Mr. Chapman's letter went on to suggest that it would be prudent for the NMI government to "accept the applicable limitations and exceptions contained in the 1974 amendments to the Territorial Submerged Lands Act . . . which are not inconsistent with its

current legal status, in managing and disposing of its submerged lands and their resources." *Id.* at 3.

Mr. Chapman's June 29, 1978 letter was transmitted to the NMI legislature. *See* U.S. Exh. 20. According to a State Department press release dated July 25, 1978, Roger St. Pierre, a legal consultant to the NMI legislature, disputed Mr. Chapman's conclusions and was reported to have said that because the Marianas Constitution granted ownership of the submerged lands to the Commonwealth, and because the United States approved the Constitution, the federal government had no jurisdiction over them. *Id.*

In a letter dated July 31, 1978 (U.S.Exh. 21), Mr. Chapman issued a rebuttal to the press reports of Mr. St. Pierre's position on submerged lands, reaffirming the United States' position that:

> When the Northern Marianas becomes a Commonwealth and a territory of the United States the submerged lands will belong to the United States by operation of law, and thereafter it will take an act of Congress, pursuant to its plenary authority under Article IV, Section 3, Clause 2, of the [U.S.] Constitution to convey title in them to the local government. It is a well settled rule that the United States cannot be divested of its title to property except by an Act of Congress.

Id. at 2.

19. Notwithstanding Articles XI, § 1 and XIV, § 1 of the CNMI Constitution, and Mr. Chapman's legal opinions, the NMI legislature enacted two statutes during the 1979-1980 time frame, which purported to assert the NMI government's sovereignty and/or exclusive jurisdiction

over submerged lands and marine resources off the coast of the Commonwealth.

In the NMI "Submerged Lands Act," the NMI legislature asserted ownership of submerged lands "out to the ocean to a distance of two hundred nautical miles." (U.S. Exh. 22, at 141.) That legislation also assigned to the CNMI "Director of Natural Resources" the responsibility to issue exploration licenses and development leases for the oceanic submerged lands abutting the NMI. *Id.* at 142.

In May 1980, the NMI legislature enacted the "Marine Sovereignty Act of 1980." (U.S.Exh. 23.) That legislation purported to assert that the NMI government has sovereignty over a twelve-mile territorial sea, as measured from straight archipelagic baselines, as well as a 200-mile exclusive economic zone measured from the same baselines. *Id.* at 2-104 to 2-106. Neither the NMI "Submerged Lands Act" nor the "Marine Sovereignty Act" contained a sunset provision providing for expiration to coincide with the termination of the Trusteeship. To date, neither statute has been repealed.

20. Section 802(a) of the Covenant provides that "[t]he following property will be made available to the Government of the United States by lease to enable it to carry out its defense responsibilities:

> (1) on Tinian Island, approximately 17,799 acres (7,203 hectares) and the waters immediately adjacent thereto; . . . [and]
>
> (3) on Farallon de Medinilla Island, approximately 206 acres (83 hectares) encompassing the entire island, and the waters immediately adjacent thereto."

(U.S. Exh. 10, at 29.) A separate "Technical Agreement," executed pursuant to Covenant § 803(c), provided that the U.S. would forfeit its leasing rights unless payment therefor was received by the NMI Government within five years after Section 802 became effective: January 9, 1983. (U.S. Exh. 24, at 2-3.)

To meet the five-year leasing deadline, the U.S. Department of Defense commenced negotiations with the CNMI over leasing the areas described in Covenant § 802(a). Because the Marianas Public Land Corporation (established by Article XI, § 3, of the CNMI Constitution) possessed leasing authority concerning only surface lands, *i.e.*, uplands, the NMI legislature enacted a statute authorizing the NMI Governor to execute a lease with the United States concerning the "waters immediately adjacent" to "the leased surface lands on Tinian and Farallon de Medinilla Islands," including the right "to facilitate access and egress to the leased surface areas and to construct reasonable port facilities." Commonwealth Code, § 1412; Pub.L. No. 3-40, § 2 (Jan. 1, 1983); U.S. Exh. 25. On January 6, 1983, the United States executed a single, integrated lease with the Mariana Public Lands Corporation for surface areas and with the Governor for the waters immediately adjacent to the leased surface areas on Tinian and Farallon de Medinilla Islands. (U.S.Exh. 26.)

21. On March 10, 1983, three years before the U.N. Trusteeship ended, President Reagan issued Proclamation No. 5030, 48 Fed.Reg. 10605 (1983), establishing an "exclusive economic zone" ("EEZ") confirming that the U.S. claimed sovereign rights and control over the natural resources (living and non-living) of the seabed, subsoil, and superjacent waters beyond the territorial sea but

within 200 nautical miles of United States' coasts. (U.S. Exh. 27, at 2-3.) The Proclamation expressly applied to the NMI to the extent consistent with the Covenant and the U.N. Trusteeship Agreement. *Id.*; 48 Fed.Reg. at 10605.

22. In August, 1985, the "Northern Mariana Islands Commission on Federal Laws" ("Commission on Federal Laws") issued "Welcoming America's Newest Commonwealth," a report to the U.S. Congress prepared pursuant to § 504 of the Covenant. (U.S.Exh. 28).[12] In the Report, the Commission stated that "[u]ntil termination of the trusteeship, the United States has no claim to ownership of submerged lands in the Northern Mariana Islands." *Id.* at 175. On the other hand, the Report conceded that just because "the Northern Mariana Islands is now the owner of the submerged lands adjacent to its shores does not mean its ownership will survive termination of the

[12] Section 504 of the Covenant provides, as relevant here:

> The President will appoint a Commission on Federal Laws to survey the laws of the United States and to make recommendations to the United States Congress as to which laws of the United States not applicable to the Northern Mariana Islands should be made applicable and to what extent and in what manner, and which applicable laws should be made inapplicable and t what extent and in what manner. The Commission will consist of seven persons (at least four of whom will be citizens of the Trust Territory of the Pacific Islands who are and have been for at least five years domiciled continuously in the Northern Mariana Islands at the time of their appointments) who will be representative of the federal, local, private and public interests in the applicability of laws of the United States to the Northern Mariana Islands. (U.S. Exh. 10 at 16-17.) In early 1980, President Carter appointed the Commission members, a majority of whom, per § 504, were NMI residents. The Commission met on ten occasions between May 1980 and May 1985. *See* U.S. Exh.28 at 434-35.

Trusteeship." *Id.* at 178. As the Commission explained, "[o]n termination of the Trusteeship, sovereignty over the Northern Mariana Islands will become vested in the United States. At that time, ownership of the submerged lands becomes uncertain." *Id.* at 177. Citing to two of the United States Supreme Court's seminal "tidelands" cases, *United States v. California*, 332 U.S. 19, 34, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947) and *United States v. Texas*, 339 U.S. 707, 70 S.Ct. 918, 94 L.Ed. 1221 (1950), *see id.* at 177-78, and noting that there were arguments both in favor of and against continued CNMI ownership of submerged lands after the Trusteeship terminated, *id.* at 177, the Commission recommended that the U.S. Congress enact legislation to "clarify" that the CNMI was the owner of "lands permanently or periodically covered by tidal waters within three geographical miles of the coastlines of the Northern Mariana Islands." *Id.* at 172. According to the Report, "[t]he legislation here proposed thus follows the track already laid by Congress in conveying lands to the States and to other territories." *Id.* at 180 (referencing in a subsequent discussion, *id.* at 180-83, the federal Submerged Lands Act, 43 U.S.C. § 1301(a),(b), and the Territorial Submerged Lands Act, 48 U.S.C. § 1705(a)).

23. In 1985, all remaining TTPI districts except Palau entered into Compacts of Free Association pursuant to which independent sovereignties would be formed. Compact of Free Association Act of 1985, Pub.L. No. 99-239, 99 Stat. 1770 (1986) (appearing at 48 U.S.C. § 1901 note (1994)). On November 3, 1986, President Reagan issued Proclamation No. 5564, declaring that the U.N. Trusteeship was terminated with respect to the Marshall Islands, the Federated States of Micronesia, and the

Northern Mariana Islands. (U.S. Exh. 29; 51 Fed.Reg. 40,399.)

Pursuant to § 1002 of the Covenant, the President proclaimed that Sections 101 and 104, among others, would become effective at 12:01 a.m. on November 4, 1986, and that, as of that date, "the Commonwealth of the Northern Mariana Islands in political union with and under the sovereignty of the United States of America is fully established." *Id.*; 51 Fed.Reg. at 40,400.

24. On November 23, 1986, the CNMI requested formal consultations with a "special representative" of the President of the United States, pursuant to Section 902 of the Covenant, concerning the ownership of submerged lands and marine resources. (U.S.Exh. 30.)[13] On March 30, 1987, the Special Representative of the CNMI's Governor prepared a position paper, stating that "[t]he jurisdiction of the Commonwealth over its oceans, submerged lands and the natural resources of the surrounding sea was not specified in the Covenant." (U.S. Exh. 31, at 4.) Despite the recommendations that the Commission on Federal Laws had made less than two years earlier (*i.e.*, that

[13] Section 902 of the Covenant specifies that

> The Government of the United States and the Government of the Northern Mariana Islands will consult regularly on all matters affecting the relationship between them. At the request of either Government, and not less frequently than every ten years, the President of the United States and the Governor of the Northern Mariana Islands will designate special representatives to meet and to consider in good faith such issues affecting the relationship between the Northern Mariana Islands and the United States as may be designated by either Government and to make a report and recommendations with respect thereto.

federal legislation be enacted to convey three miles of oceanic submerged lands to the CNMI), the CNMI's § 902 representative asserted that the Commonwealth should have the "same rights in the ocean and exclusive economic zone (EEZ) as are recognized for coastal states in the United Nations Convention on the Law of the Sea (UNCLOS), subject only to appropriate oversight by the Government of the United States in the areas of foreign affairs and defense." *Id.* at 6. Accordingly, the CNMI recommended that U.S. legislation be enacted that established the Commonwealth's right, on a permanent basis, to exercise exclusive jurisdiction over a 12-mile territorial sea as well as a 200-mile exclusive economic zone. *Id.* at 55-64.

25. On April 12, 1990, a special representative of the President of the United States, Timothy W. Glidden, executed a memorandum of agreement indicating that Mr. Glidden would personally support the Commonwealth's proposal that the CNMI's alleged sovereign right to ownership and jurisdiction of the waters and seabed surrounding the NMI be recognized and confirmed "to the full extent permitted by international law." (U.S. Exh. 32, at 1.) In that memorandum, Mr. Glidden also agreed to seek resolution of the issue within the Government of the United States consistent with the CNMI's proposal. *Id.* at 2.

On September 18, 1990, Mr. Glidden prepared a position paper detailing what proved to be his unsuccessful efforts to obtain support within the U.S. government for the Commonwealth's proposed resolution of the submerged lands and ocean resources issue. (U.S.Exh. 33.) According to Mr. Glidden's position paper, the U.S. government was of the view that exclusive jurisdiction and control over the submerged lands and marine resources off

the coast of the CNMI had passed to the U.S. when the U.S. acquired sovereignty over the CNMI in November 1986, and that there was no basis in law for the CNMI's claim of ownership and/or control over 200-mile exclusive economic zone. *Id.* at 3-4.

26. In 1992, and again in 1995 and 1996, the disagreement over the CNMI's claim to submerged lands and ocean resources became the subject of additional rounds of § 902 consultations. During this period, the special representatives of the CNMI Governors and of the President of the United States exchanged several more position papers, each adhering to their opposing positions on the issue of submerged lands and ocean resources. U.S. Exhs. 34 – 40. From 1987 to 1997, U.S. officials made several offers to sponsor legislation that would grant CNMI authority to control submerged lands and marine resources to a point three miles from shore. *See* U.S. Exhs. 61, at 0879; 63, at 0884; 64, at 0888; 65, and 66. The CNMI declined all such offers. (U.S. Exh. 38, at 0638; 63, at 0884; 64, at 0888.)

27. On August 21, 1995, the CNMI's Department of Land and Natural Resources executed a "Submerged Lands Lease Agreement" with the Marine Revitalization Corporation ("MRC"), pursuant to which the MRC was to construct a 76-slip boat marina complex at American Memorial Park on Saipan. (U.S.Exh. 41.) That agreement made no reference to the United States' authority over the portion of the leased premises that consisted of submerged lands and did not expressly require the MRC to obtain U.S. approval.

During the spring of 1996, the U.S. Department of the Interior notified MRC of the United States' authority over the submerged lands aspect of the lease. *See* U.S. Exh. 42.

Accordingly, the U.S. Park Service and MRC executed a separate concession agreement for Outer Cove Marina, which contained language acknowledging the dispute between the U.S. and the CNMI over the ownership of submerged lands, and stating that "neither the Commonwealth nor the United States waives or concedes any claim to ownership or control of the submerged lands. . . ." (U.S. Exh. 43, at 0749.)

The CNMI's Quiet Title Act complaint followed.

Conclusions of Law

1. The Covenant controls the rights, responsibilities, and political relationship between the United States and the Commonwealth of the Northern Mariana Islands. Section 101 of the Covenant specifies that the CNMI is under the sovereignty of the United States. As an incident of external sovereignty, the United States, under U.S. law, acquired ownership and paramount rights in the submerged lands and marine resources seaward of the CNMI's low-water mark at the termination of the U.N. Trusteeship. Stated differently, the United States is the owner of, and has paramount authority over, the submerged lands lying seaward of the Commonwealth's coastlines and inland waters because the Commonwealth ceded authority over those submerged lands upon full implementation of the Covenant. In Covenant § 101, the Commonwealth entered into a relationship with the United States as sovereign, like every other U.S. State and Territory. That relationship became effective on November 4, 1986. Wherever a sovereignty relationship exists between the United States and a State or Territory abutting oceanic waters, the United States' paramount authority

over submerged lands seaward of the low water mark attaches as an incident of that sovereignty.

Under federal constitutional law, paramount power over submerged lands is vested in the United States as a necessary element of national external sovereignty. In *United States v. California*, 332 U.S. 19, 34, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947), the Court rejected California's claim to ownership of the oceanic submerged lands within three miles of the coastline. The Court held that the protection and control of adjacent seas is a function of national external sovereignty which, under the constitutional system, requires that paramount rights over the submerged lands underlying adjacent oceanic waters and their natural resources be vested in the federal government. The Court also made clear that "the Federal Government has the paramount right and power to determine in the first instance when, how, and by what agencies . . . the oil and other resources of the soil of the marginal sea . . . may be exploited." 332 U.S. at 29.[14]

Similarly, in *United States v. Texas*, 339 U.S. 707, 70 S.Ct. 918, 94 L.Ed. 1221 (1950), another submerged lands case, this one involving lands underlying the Gulf of Mexico, the Supreme Court concluded that even if Texas, prior to statehood, had full ownership and sovereignty

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[14] In subsequent litigation, the Supreme Court extended the *California* doctrine from the three-mile limit to the outer continental shelf. In *United States v. Louisiana*, 339 U.S. 699, 704, 70 S.Ct. 918 (1950), the Court explained that, with respect to the outer continental shelf, "[t]he problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area."

over the adjacent seas and seabed, such ownership could not survive the State's admission to the Union:

> It is said that . . . the sovereignty of the sea can be complete and unimpaired no matter if Texas owns the oil underlying it. . . . Yet, . . . once the low-water mark is passed the international domain is reached. Property rights must then be so subordinated to political rights as in substance to coalesce and unite in the national sovereign. . . . If the property, whatever it may be, lies seaward of the low-water mark, its use, disposition, management, and control involve national interests and national responsibilities. That is the source of national rights in it.

339 U.S. at 719.[16]

2. The paramountcy doctrine applies to U.S. Territories to the same extent as to States; it extends to *all* cases in which *any* plaintiff asserts a claim of ownership in submerged lands underlying the ocean abutting an area over which the U.S. has sovereignty. *See e.g. Village of Gambell v. Hodel,* 869 F.2d 1273, 1276 (9th Cir.1989) ("*Gambell III*") (In *Gambell III,* the Ninth Circuit rejected a contention that the principles enunciated in the Supreme Court's paramountcy cases did not apply in cases where plaintiff is not a U.S. state, holding that the fact that the paramountcy cases involved States rather than Alaskan natives was "a distinction without a difference. . . .") Similarly, in *Native Village of Eyak v. Trawler*

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[16] Later, in *United States v. Maine,* 420 U.S. 515, 95 S.Ct. 1155, 43 L.Ed.2d 363 (1975), the Supreme Court rejected a claim by Atlantic Coast states that they had acquired rights to the seabed which had survived the formation of the Union, thereby reiterating the continued vitality of the paramountcy doctrine.

Diane Marie, Inc., 154 F.3d 1090, 1095 (9th Cir.1998), the Ninth Circuit unequivocally declared:

> the paramountcy doctrine is not limited merely to disputes between the national and state governments. Any claim of sovereign right or title over the ocean by any party other than the United States, including Indian tribes, is equally repugnant to the principles established in the paramountcy cases.

As the court further explained:

> Whatever interests the states might have had in the [outer continental shelf] and marginal sea prior to statehood were lost upon ascension to the Union. The Constitution allotted to the federal government jurisdiction over foreign commerce, foreign affairs, and national defense so that as attributes of these external sovereign powers, it has paramount rights in the contested areas of the sea. This principle applies with equal force to *all* entities claiming rights to the ocean: whether they be the Native Villages, the State of Oregon, or the Township of Parsippany. "National interests, national responsibilities, national concerns are involved" in all these cases.

Id. at 1096 (emphasis in original).

Because Covenant § 101 granted the United States full sovereignty over the NMI at the termination of the Trusteeship, and does not expressly reserve to the CNMI ownership of the submerged lands and marine resources underlying the oceanic waters off its coastlines, the United States, based on long-standing precedent, possesses the paramount rights in the marine resources and oceanic submerged lands abutting the Commonwealth, contrary to

the CNMI's claim of ownership and assertions of sovereignty. On this basis alone, the United States could be and is granted summary judgment, and the court rejects the CNMI's quiet title complaint seeking a "judgment declaring that title to the submerged lands underlying the . . . archipelagic waters, and territorial waters adjacent to the Northern Mariana Islands is vested in the Commonwealth of the Northern Mariana Islands." (CNMI Compl. at 16).[16] For the same reason, the United States is granted the relief requested in its counterclaim, namely, a declaratory judgment decreeing that the United States possesses "paramount rights in and powers over the waters extending seaward of the ordinary low water mark on the Commonwealth coast and the lands, minerals, and other things of value underlying such waters." (U.S.Counterclaim, ¶ 44.)

3. In order for the Commonwealth to hold ownership of oceanic submerged lands in the face of the federal paramountcy doctrine, a clear, express and unequivocal Congressional enactment transferring such lands to the Commonwealth would be required. There has never been such a declaration. Neither the Covenant nor any other federal law expressly and unequivocally transfers control of any submerged lands to the Commonwealth. Thus, the federal paramountcy doctrine is dispositive of the United

[16] In its complaint, the CNMI also seeks the same declaratory relief concerning its internal waters. Because the U.S. has not contested the Commonwealth's claim of ownership of or paramount rights to waters inland of the CNMI's low-water mark, there is no case or controversy that requires this court to exercise subject matter jurisdiction over the claim for declaratory relief concerning the CNMI's internal waters. For that reason the court does not address that aspect of the Commonwealth's complaint.

States' claim to the oceanic submerged lands abutting the Commonwealth.

In ¶ 34 of its complaint, the CNMI alleges that "in Section 801 [of the Covenant] Defendant United States agreed to transfer and Plaintiff Commonwealth agreed to receive 'all right, title, and interest of the Trust Territory of the Pacific Islands' in and to the submerged lands . . . no later than the termination of the Trusteeship Agreement."

Covenant § 801 did not constitute a conveyance of oceanic submerged lands and associated natural resources to the Commonwealth. Under U.S. law, the United States cannot be divested of property subject to its sovereignty, ownership, and jurisdiction absent an *explicit* congressional grant or conveyance, which § 801 lacks. In *United States v. Texas, supra*, the Supreme Court declared that "[d]ominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged. . . ." 339 U.S. at 717. It has long been the law that "disposals by the United States . . . are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *United States v. Holt State Bank*, 270 U.S. 49, 55, 46 S.Ct. 197, 70 L.Ed. 465 (1926). Consequently, this Court's determination as to whether Congress intended to divest the United States, as sovereign, of its paramount interests in the oceanic submerged lands off the coasts of the CNMI must be analyzed in light of the bedrock principle that "land grants are construed favorably to the Government, that *nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it.*" *Watt v. Western Nuclear, Inc.*, 462 U.S. 36,

59, 103 S.Ct. 2218, 76 L.Ed.2d 400 (1983) (emphasis added); *see also California ex rel. State Lands Comm. v. United States*, 457 U.S. 273, 287, 102 S.Ct. 2432, 73 L.Ed.2d 1 (1982); *United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 116, 77 S.Ct. 685, 1 L.Ed.2d 693 (1957).

The principle – that it takes explicit federal legislative action to convey oceanic submerged lands to states and territories before the latter may own and/or regulate such lands – has been followed by the U.S. Congress since at least 1947. In 1953, in response to the Supreme Court's 1947-1950 "tidelands" cases, *supra*, Congress enacted the federal Submerged Lands Act, which generally grants to coastal States title and ownership of the lands beneath the navigable waters for a distance of three nautical miles seaward from their coasts. 43 U.S.C. §§ 1301, 1311(a). Similarly, in 1963 and 1974, Congress enacted the Territorial Submerged Lands legislation to convey to the governments of Guam, the Virgin Islands, and American Samoa, submerged lands within three geographical miles seaward of their coasts. *See* Pub.L. No. 183, 88th Cong. 1st Sess., 77 Stat. 338 (1963); *see also* 48 U.S.C. §§ 1705(a), (b).[17]

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[17] The 1963 Territorial Submerged Lands legislation, 77 Stat. 338 (1963), authorized the U.S. Department of the Interior to convey a three-mile belt of submerged lands to those U.S. Territories. The 1974 legislation, 48 U.S.C. §§ 1705(a), (b), conveyed those submerged lands to the specified U.S. Territories outright.

In the legislative history of the Territorial Submerged Lands Act (*i.e.*, the 1974 legislation), the U.S. Department of Justice reported to Congress about the 1958 decision (discussed *supra*) by the Solicitor of the Department of the Interior, 65 Int. Dec. 193 (1958), that "tidelands and submerged lands . . . were not transferred to the Government of Guam . . . in view of the general rule that such lands do not ordinarily pass under the general statutes but must be specified particularly." 1974 U.S.Code Cong. & Ad. News 5464, 5466 (1974). Consistent with

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Thus, when Congress considered and approved the Covenant in 1976, it knew that no transfer or reservation of oceanic submerged lands to the Commonwealth would occur, unless Congress said so by explicit language in the Covenant or by separate legislation.

Section 801 reflects no congressional intention or agreement that ownership of oceanic submerged lands should vest in the Commonwealth.

As relevant here, § 801 provides:

> All right, title and interest of the Government of the Trust Territory of the Pacific Islands in and to *real property* in the Northern Mariana Islands on the date of the signing of this Covenant or thereafter acquired in any manner whatsoever will, no later than upon the termination of the Trusteeship Agreement, be transferred to the Government of the Northern Mariana Islands.

(U.S. Exh. 10, at 28; emphasis added.)

The Section-By-Section Analysis of the Covenant explains the scope of § 801 as follows:

> Section 801 provides that all of the real property (including buildings and permanent fixtures) to which the Government of the Trust Territory of the Pacific Islands holds any right, title, or interest, will be transferred to the Government of the Northern Marianas. The transfer will take place no later than the time of the termination of the

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that view, the Senate Report on the Territorial Submerged Lands Act declared, "the submerged lands of Guam, the Virgin Islands, and American Samoa are owned by the Federal Government and administered by the Department of the Interior." *Id.* at 5464-65.

> trusteeship. The Section applies to all land to which the Trust Territory Government has rights on the date that the Covenant is signed, or which it acquires thereafter in any manner whatsoever. The Section serves as a guarantee that all of the public land in the Northern Marianas will be returned to its rightful owners, the people of the Northern Marianas. It is expected that a very substantial amount of land will be returned far sooner than the termination of the Trusteeship. Under the U.S. Land Policy Statement and its implementing Secretarial Order, it is expected that much public land will be transferred as soon as a land entity is established by the Mariana Islands District Legislature to hold land in trust for the people of the Northern Marianas. This section assures all of the land will come back no later than termination, and that no land can be disposed of other than to the Government of the Northen Mariana Islands.

(U.S. Exh. 11, at 95-96.)

Because § 801 does not define "real property,"[18] and because the Analysis does not make any reference to oceanic submerged lands as among the "public lands"

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[18] In the absence of any definition of "real property" in the Covenant, this court must construe the "term in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994) (*citing Smith v. United States*, 508 U.S. 223, 228, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993)). Black's Law Dictionary (5th Ed.) defines "real property" as "Land, and generally whatever is erected or growing upon or affixed to land." The New Shorter Oxford English Dictionary's first definition of "land" is "the solid part of the earth's surface, as distinguished from the sea or water, or from the air." Thus, the ordinary, plain meaning construction of "real property" does not include oceanic submerged lands within Covenant § 801's coverage.

which must be returned to the Commonwealth, there is no indication whatsoever that the drafters of the Covenant considered "real property" to mean anything other than "fast lands," *i.e.*, dry, above-surface lands. Certainly, it cannot be said that either Covenant § 801 or the Analysis contains an express reservation of oceanic submerged lands that would permit a divestiture from the United States of the paramount rights to those lands that the U.S. acquired as an incident of the sovereignty that became effective upon termination of the Trusteeship Agreement.

The Commonwealth previously conceded that the status of oceanic submerged lands and marine resources was not addressed in the Covenant. In the Commission on Federal Laws' Second Interim Report (August 1985), the CNMI representatives acknowledged that "[b]ecause neither Section 801 nor its negotiating history mentions submerged lands, it can be argued, with the Department of the Interior opinion as precedent, that section 801 transfers only fast lands." (U.S. Exh. 28, at 179). For that reason, among others, the Commission recommended that:

> Legislation should be enacted to convey to the Northern Mariana Islands any property rights of the United States in lands permanently or periodically covered by tidal waters within three geographical miles of the coastlines of the Northern Mariana Islands. The proposed legislation is similar to laws already enacted to convey federal interests in submerged lands to the States of the Union, Guam, the Virgin Islands, and American Samoa.

Id. at 172.

In subsequent position papers, the CNMI repeatedly acknowledged that "the Covenant is silent on the subject of

ocean jurisdiction of the Northern Mariana Islands in general," and that "it is a curious blind spot in the Covenant that the jurisdiction of the Commonwealth over its oceans, submerged lands, and the natural resources was not specified." (U.S. Exh. 30, at 3; *see also* U.S. Exh. 31, at 4).[19] In light of these concessions, the CNMI's allegation in ¶ 34 of its Complaint that § 801 constitutes an "agreement" by the United States to "transfer" oceanic submerged lands to the CNMI cannot be sustained.

4. Further, the CNMI's assertion that § 801 of the Covenant transferred oceanic submerged lands to the Commonwealth is belied by the CNMI Constitution.

As previously noted, the drafters of the CNMI Constitution demonstrated their understanding in late 1976 – approximately nine months after Section 801 of the Covenant became effective – that oceanic submerged lands would only pass to the Commonwealth pursuant to "United States law" and not § 801 of the Covenant. Specifically, Article XI, Section 1, of the CNMI Constitution provides:

> Section 1: *Public Lands.*
>
> The lands as to which right, title or interest have been or hereafter are transferred from the Trust Territory of the Pacific Islands to any legal entity in the Commonwealth under Secretarial Order 2969 promulgated by the U.S. Secretary of the Interior, on December 26, 1974,

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[19] *See also* U.S. Exh. 31, at 46, where the CNMI stated: "*Unlike the protections included for land,* the Covenant makes no specific provision for ownership, conservation or control of the oceans and marine resources." (Emphasis added)

> the lands as to which right, title or interest have been vested in the Resident Commissioner under Secretarial Order 2989 promulgated by the U.S. Secretary of the Interior on March 24, 1976,
>
> the lands as to which right, title or interest have been or hereafter are transferred to or by the government of the Northern Marianas Islands *under Article VIII of the Covenant, and*
>
> *the submerged lands off the coast of the Commonwealth to which the Commonwealth now or hereafter may have a claim of ownership under United States law* are public lands and belong collectively to the people of the Commonwealth who are of Northern Marianas descent.

(U.S. Exh. 13, at 19; emphases added).

There would have been no reason for the NMI Constitution's framers to describe these submerged lands in Constitution Art. XI, § 1 separately from lands transferred to the Commonwealth "under Article VIII of the Covenant" pursuant to Art. XI, § 1 of the Constitution if oceanic submerged lands abutting the Commonwealth were already subsumed as "real property" of the Trust Territory Government within the meaning of § 801 of the Covenant. By describing oceanic submerged lands separately from lands transferred pursuant to Article VIII of the Covenant, the framers in Art. XI, § 1 of the CNMI Constitution acknowledged and conceded that ownership and control of oceanic submerged lands would not pass to the Commonwealth pursuant to Article VIII of the Covenant.[20]

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[20] As a separate matter, it is highly probative that the framers in Art. XI, § 1 of the CNMI Constitution characterized any

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5. The United States' exercise of paramount rights over the oceanic submerged lands abutting the Commonwealth does not infringe upon the CNMI's right of local self-government under Covenant § 103. That section provides:

> The people of the Northern Mariana Islands will have the right of local self-government and will govern themselves with respect to *internal*

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claim that the CNMI might have to ownership of submerged lands as governed by "United States law." Explaining this reference to "United States law" in Art. XI, the *CNMI Constitutional Analysis* (Dec. 6, 1976, stated: Section 1 includes all submerged lands to which the Commonwealth now or at any time in the future may have any right, title or interest. The U.S. is the owner of submerged lands off the coasts of the states under territorial waters. The states have no rights in these lands beyond that transferred by the U.S. The federal power over these lands is based on the provisions of the U.S. Constitution with respect to defense and foreign affairs. *Under article 1, section 104, of the Covenant, the United States has defense and foreign affairs powers with respect to the Commonwealth and thus has a claim to the submerged lands off the coast of the Commonwealth as well. Section 1 recognizes this claim and also recognizes that the Commonwealth is entitled to the same interest in the submerged lands off its coasts as the United States grants to the states with respect to the submerged lands off their coasts.* Under this section, any interest in the submerged lands granted to the states or to the Commonwealth in the future also will become part of the public lands of the Commonwealth.

(U.S. Exh. 15, at 144; emphasis added.)

The foregoing strongly indicates that the framers of the CNMI Constitution, nine months after § 801 became effective, knew and understood that title to oceanic submerged lands had not passed to, nor was reserved to, the Commonwealth by virtue of § 801 of the Covenant, but instead would pass to the CNMI only in the same way title to oceanic submerged lands had passed to the States and other U.S. Territories, *i.e.*, by future U.S. legislation.

> affairs *in accordance with a Constitution of their own adoption.*

(U.S. Exh. 10, at 6; emphasis added.)

As previously explained, the CNMI Constitution explicitly acknowledges that whatever claim the CNMI may have to ownership of oceanic submerged lands and resources would be governed by U.S. law, not § 801 of the Covenant. *See* CNMI Const. Art. XI, § 1 and Art. XIV, § 1 (and corresponding sections of the *CNMI Constitutional Analysis*); U.S. Exh. 13, at pp. 19, 23; and U.S. Exh. 15, at pp. 144, 181.

Under United States law, ownership of submerged lands seaward of the coastline is neither an incident of local self-government nor within the police powers of any U.S. State or Territory. Rather, as the Supreme Court succinctly put it: "[i]f the property, whatever it may be, lies seaward of the low-water mark, its use, disposition, management, and control involve national interests and national responsibilities." *United States v. Texas,* 339 U.S. at 719. Indeed, as the Court declared more emphatically in *United States v. Louisiana:*

> Protection and control of the area are indeed functions of national external sovereignty. The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.

339 U.S. at 704.

Given that control of oceanic submerged lands, as a matter of U.S. law, is a function of national sovereignty, and

given that the Commonwealth has ceded sovereignty to the United States pursuant to Section 101 of the Covenant, the CNMI's claim to ownership of submerged lands as a "right of self-government and the right to govern themselves with respect to internal affairs" must be and is rejected.

6. The Commonwealth's contention that it owns the oceanic submerged lands abutting the coast of the Commonwealth because it did not enter into political union with the United States on an "equal footing" with the other states of the United States is also rejected. In ¶ 32 of its complaint, the CNMI alleges that it owns the oceanic submerged lands abutting the Commonwealth because:

> [u]nder the Covenant, the Commonwealth is not incorporated into the United States, that is, it is not intended to eventually become a State of the United States. The Commonwealth is not on an equal footing with the States of the United States.

Article IV, § 3, cl. 1, of the U.S. Constitution provides for the admission of new States to the Union. In *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 228-229, 11 L.Ed. 565 (1845), the Supreme Court ruled that, under the U.S. Constitution, new States are admitted to the Union on an "equal footing" with the original thirteen colonies. As relevant here, "equal footing" means that a newly admitted State presumptively succeeds to the United States' ownership of tidelands (*viz.*, coastal lands between high and low tide) and lands beneath inland navigable waters within the State's boundaries. *Id.; see Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 108 S.Ct. 791, 98 L.Ed.2d 877 (1988); *Shively v. Bowlby*, 152 U.S. 1, 26-31, 14 S.Ct. 548, 38 L.Ed. 331 (1894). In addition, Guam, the Virgin Islands, American Samoa, and Puerto Rico did not enter

upon a political relationship with the United States on an equal footing with the States of the United States, yet the federal paramountcy doctrine necessitated that specific U.S. legislation – in the form of the Territorial Submerged Lands Act of 1974, 48 U.S.C. § 1705(a) – be enacted to convey ownership of oceanic submerged lands abutting those U.S. territories.

The equal footing doctrine has no application, however, to submerged lands seaward of the low-water mark. *United States v. California*, 332 U.S. 19, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947). Because the submerged lands at issue in this case are neither "coastal lands between high and low tide" nor "lands beneath inland navigable waters" within the CNMI's boundaries, the equal footing doctrine has no application to this case.

7. The Commonwealth's argument that the United States' lease of Commonwealth lands and adjacent waters for defense purposes pursuant to Covenant § 802 constitutes an "acknowledgment" by the U.S. that the CNMI owns the oceanic submerged lands abutting the Commonwealth presents no genuine issue of material fact. As noted above, on January 6, 1983, the CNMI and the U.S. executed a lease pursuant to Covenant § 802, which provides, in pertinent part:

> The Commonwealth does hereby grant, demise, and let unto the United States ... and the United States does hereby accept and rent from the Commonwealth pursuant to Section 802 of the Covenant waters of the Commonwealth immediately adjacent to the leased surface lands on Tinian and Farallon de Medinilla Islands.... The United States shall have the right within the waters to facilitate access and egress to the

> leased surface lands and to construct reasonable port facilities; PROVIDED, that the United States shall disturb to the minimum extent possible the seabed and subsoil in exercising its right of construction. The Commonwealth retains the right, without undue interference to the rights of the United States under this Lease Agreement, to exploit the living and nonliving resources of the waters immediately adjacent to the leased surface lands.

(U.S. Exh. 26, at 4.)

In ¶ 38 of its complaint, the CNMI argues that this lease language reflects a concession on the part of the United States that the Commonwealth was, at the time of the lease, the owner of the oceanic submerged lands adjacent to the leased surface lands on the islands of Tinian and Farallon de Medinilla. This claim does not withstand scrutiny.

Without conceding that the CNMI owned oceanic submerged lands off the coast of the Commonwealth, the United States deemed it necessary to lease from the CNMI waters immediately adjacent to Tinian and Farallon Islands. This was because coastal tidelands – that is, the CNMI's intermittently submerged lands between the high and low water mark – which the Defense Department must traverse to access and egress leased surface areas),[21]

[21] Under United States law, the lands between the high and low water marks are not owned by the United States, but by the adjacent states themselves, in trust for their people. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 11 L.Ed. 565 (1845). The language in § 802 of the Covenant that provides for the U.S. to lease waters "immediately adjacent" to leased surface areas reflects the United States' recognition that, as a matter of U.S. Government policy (not the equal footing

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and waters within port facilities such as harbors and harborworks, and other coast protective structures that facilitate access and egress to shorelines, such as artificial breakwaters, jetties, and groins, are considered *internal* waters not subject to the federal paramountcy doctrine. *See e.g. United States v. Louisiana*, 394 U.S. 43, 49-50 n. 64, 89 S.Ct. 773 (1969); *see generally* M.W. Reed, *Shore and Sea Boundaries, Volume Three*, U.S. Exh. 47, at 50 – 57 (U.S. Govt. Printing Office 2000). The U.S. has made no claim to the internal waters and tidelands of the CNMI, and those waters and intermittently submerged lands are not at issue in this case. Thus, the United States' lease of the waters "immediately adjacent" to Tinian and Farallon de Medinilla for the purposes of facilitating access and egress and constructing reasonable port facilities cannot be viewed as a concession by the U.S. that the CNMI owns the submerged lands seaward of the low water mark abutting the Commonwealth's coasts.

8. The Commonwealth's allegations that the United States' "collective words," in a land return policy statement, and in Secretarial Order Nos. 2969 and 2989, promised to convey permanent ownership of submerged lands off the coast of the Commonwealth to the CNMI government are not supported and do not raise a genuine issue of material fact.

In paragraphs 26, 27, and 35 of the complaint, the Commonwealth seeks to portray a series of events aimed at returning public lands to the TTPI districts generally (a

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doctrine), the rule of *Pollard's Lessee* applies within and to the CNMI, such that the CNMI has dominion over the tidelands (intermittently submerged lands) between the high and low water mark. *See* U.S. Exh. 3 at 7.

1974 land return policy statement, and Secretarial Order No. 2969), and transferring civil administration of the NMI to a "Resident Commissioner" (Secretarial Order No. 2989), as evidence that the U.S. agreed to make a permanent conveyance of oceanic submerged lands to the Commonwealth. Specifically, the CNMI alleges that on November 4, 1973, the Secretary of the Interior and the President's Personal Representative for Micronesian Status Negotiations issued a policy statement reflecting their agreement that the NMI oceanic submerged lands then being held by the TTPI government would be permanently returned to the NMI people. Comp. ¶ 26. The Commonwealth complaint goes on to allege that, on December 28, 1974, the Interior Secretary issued Secretarial Order No. 2969 specifically to implement the alleged policy of returning oceanic submerged lands to the NMI people. Comp. ¶ 27. In paragraph 35 of the complaint, the CNMI alleges that on April 1, 1976, the Interior Secretary issued Secretarial Order No. 2989, to separate the administration of the NMI from the TTPI government's administration of the rest of Micronesia, and thereby vested in the Resident Commissioner (a U.S. government position established by Order No. 2989) title to all oceanic submerged lands. According to the Commonwealth, the NMI government "succeeded to all powers, rights, and authority of the Resident Commissioner, thereby receiving title to all submerged lands in the [NMI]," on January 9, 1978, *i.e.*, when the NMI constitutional government superseded the civil administration established by Secretarial Order No. 2989. Comp. ¶ 35.

a. The November, 1973, Land Return Policy Did Not Contemplate a Transfer of Unrestricted Control Over Oceanic Submerged Lands to the Northern Mariana Islands

There is no substance to the Commonwealth's assertion (Comp. ¶ 26) that the Land Return Policy Statement constituted an agreement by the United States to convey its interest in oceanic submerged lands abutting the Commonwealth. By its plain terms, the policy statement was finite in duration; it applied only to the status of public lands for the remaining life of the Trusteeship and did not purport to decide the legal status of such lands after termination of the Trusteeship. *See* U.S. Exh. 8 at 2 ("these limitations and safeguards will apply until the Trusteeship ends, at which time the new government will be free to modify them as it chooses"). More importantly, the land return policy did not alter the TTPI government's "quasi-sovereignty" over the TTPI districts, including the NMI. *See Temengil v. Trust Territory*, 881 F.2d 647, 652 (9th Cir.1989).[22] Until termination of the Trusteeship, the Trust Territory government continued to act as a "quasi-sovereign" over all of the TTPI districts, including the NMI, and remained responsible for the defense of the Northern Mariana Islands until the Trusteeship ended.[23]

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[22] In *Temengil*, the Ninth Circuit stated:

> [A]lthough the United States for the most part dealt with the Northern Mariana Islands as though it was a Commonwealth beginning in 1978, the area formally remained a part of the Trust Territory until the Trusteeship Agreement was dissolved in 1986.

881 F.2d at 650.

[23] Article 5 of the Trusteeship Agreement provides:

> In discharging its obligations under Article 76(a) and Article 84 of the Charter, the administering authority shall ensure

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As an incident of that "quasi-sovereignty" and responsibility for NMI defense, the TTPI government continued to control submerged lands seaward of the low water mark on the CNMI coastlines between March 24, 1976, when the Covenant was enacted by Congress, and November 4, 1986, when the Trusteeship ended. Anticipating that continued control, the land return policy statement issued in November, 1973, expressly provided that any return to the TTPI districts of "tidelands, filled lands, submerged lands, and lagoons," was subject to the retained right of the TTPI government "to control activities within these areas affecting the public interest." (U.S. Exh. 8, at 4.)

It is equally significant that, while the land return policy statement became the subject of extensive discussions during the December, 1973, round of the Marianas Political Status Negotiations, neither the record of that round or any later round of negotiations makes reference to submerged lands. *See* U.S. Exhs. 3 – 7. The sole focus of those discussions was the return of surface lands to be used for defense purposes.

Similarly, a Marianas Political Status Commission paper, issued December 13, 1973 (six weeks after the Land Return Policy Statement issued), addressing the return of public lands to the Marianas people made no reference to

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> that the trust territory shall play its part, in accordance with the Charter of the United Nations, in the maintenance of international peace and security. To this end the administering authority shall be entitled:
>
> 1. to establish naval, military and air bases and to erect fortifications in the Trust Territory; [and]
>
> 2. to station and employ armed forces in the territory. . . .

(U.S. Exh. 67, at 0896.)

submerged lands; it was devoted entirely to the return of dry lands. *See* U.S. Exh. 50.

Further, there is no genuine basis for inferring that the land return policy statement reflected the United States' intent to permanently convey oceanic submerged lands to the Commonwealth. Indeed, such an inference would be at odds with the U.S. Office of Micronesian Status Negotiations' ("OMSN") public position on the status of these lands. In May, 1973, just six months before the policy statement issued, James M. Wilson, Jr., U.S. Deputy Representative for the OMSN, set out the United States' position on a broad range of issues – including political status, public lands, economic issues, and transitional matters – prior to the opening of the second round of the Marianas future political status negotiations. (U.S. Exh. 2.) In discussing the United States' position on the return of public lands, Mr. Wilson addressed submerged lands in a way that clearly differentiated them from dry lands, stating:

> So far as submerged lands are concerned, we feel that these should vest in the future Marianas government under the new arrangement, *as in the case of the states of the United States and other territories.*

(U.S. Exh. 2 at 7.) This statement appears to have contemplated specific U.S. legislation expressly conveying submerged lands to the Commonwealth, which is the method by which oceanic submerged lands vested in "the states of the United States and other territories."[24] Also,

[24] Submerged Lands Act, 67 Stat. 29, 43 U.S.C. § 1301 *et seq.* (granting title to submerged lands beneath a 3-mile belt of the territorial sea to the several States of the U.S.); *see also* Pub. L. No. 183, 88th

(Continued on following page)

the *Analysis of the CNMI Constitution* (approved in December 1976), U.S. Exh. 15, at 144, addresses the legal status of oceanic submerged lands in a way that is perfectly consistent with the United States' May, 1973, position. *See* U.S. Exh. 2, at 7.[25] There is no indication that the United States' position on the issue of oceanic submerged lands off the coast of the Marianas shifted between May and November of 1973.

b. Secretarial Order No. 2969 Did Not Vest Ownership of Oceanic Submerged Lands in the Commonwealth

There is likewise no support for the CNMI's allegation, in ¶ 27 of the complaint, that Secretarial Order No. 2969 effectuated any transfer of oceanic submerged lands to the NMI government. Although the Order expressly applied to TTPI "public lands," defined by Sections 1 and 2 of Title 67 of the Trust Territory Code to include land below the ordinary high water mark, U.S. Exh. 51, it expressly prohibited the High Commissioner from transferring any submerged lands to a district until its legislature enacted laws "providing for . . . reservation of the

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Cong. 1st Sess., 77 Stat. 338 (1963) (giving the Department of Interior authority to convey certain oceanic submerged lands to Guam, the Virgin Islands, and American Samoa).

[25] *Compare* U.S. Exh. 2 at 7 (submerged lands "should vest in the future Marianas government under the new arrangement, as in the case of the states of the United States and other territories)" with U.S. Exh. 15 at 144 (under "[Article] 1, section 104, of the Covenant, the United States has defense and foreign affairs powers with respect to the Commonwealth and thus has a claim to the submerged lands off the coast of the Commonwealth as well. Section 1 recognizes this claim and also recognizes that the Commonwealth is entitled to the same interest in the submerged lands off its coasts as the United States grants to the states with respect to the submerged lands off their coasts.")

right of the central government of the Trust Territory of the Pacific Islands to regulate all activities affecting conservation, navigation, or commerce in and to the navigable waters and tidelands, filled lands, submerged lands and lagoons." (U.S. Exh. 9, at 0170 (rt.col.)) The pre-constitutional Marianas legislature enacted legislation reserving this right to the Trust Territory Government. *See* Marianas District Code § 15.12.020. (U.S. Exh. 48 at 131-2.) Thus, even had Secretarial Order No. 2969 contemplated a transfer of oceanic submerged lands underlying the territorial sea to the Commonwealth, the transfer would always have been subject to the TTPI's paramount right to control "conservation, navigation, or commerce" on or over such lands. (U.S. Exh. 9, at 0170 (rt.col.).)

In any event, Secretarial Order No. 2969 did not, in fact, precipitate a transfer of any public lands – fast lands or submerged lands – to the NMI government. By its own terms, Secretarial Order No. 2969 required that before any lands could be transferred by the TTPI government, a government agency would have to be created by the district legislature to receive the lands transferred pursuant to the Secretarial Order. (U.S. Exh. 9, at 0170 (rt.col.); 40 Fed.Reg. at 812.) As the CNMI constitution's framers conceded, although the Marianas district legislature established a land corporation to receive land transfers pursuant to Secretarial Order No. 2969, the corporation did not become operational before Secretarial Order No. 2989 superseded Secretarial Order No. 2969. *See* U.S. Exh. 15, at 142.[26] Thus, insofar as the Northern Marianas

[26] In the December 1976 *CNMI Constitutional Analysis*, the CNMI framers acknowledged that:

(Continued on following page)

were concerned, Secretarial Order No. 2969 was a nullity because it was never formally implemented according to its plain terms.[27]

c. Secretarial Order No. 2989 Did Not Vest Title to Oceanic Submerged Lands in the Commonwealth

The CNMI's claim that Secretarial Order No. 2989 vested title to oceanic submerged lands in the Commonwealth is also without merit. The Order did vest title to all TTPI "public lands" situated in the Northern Mariana Islands in the "U.S. Resident Commissioner," *see* U.S. Exh. 12 at 0288 (rt.col.), but it did not define "public lands" and made no reference whatsoever to submerged lands. Secretarial Order No. 2989 was simply an administrative

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> The Marianas District Legislature passed a statute, Mariana Islands District Code title 15, chapter 15.12, Act 100-75, establishing the Marianas Public Land Corporation and designating it as the legal entity under [Secretarial] Order No. 2969. *The formation of the Corporation was not complete, however, by the time [Secretarial] Order 2989 established a separate administration for the Marianas district and vested title to the public lands in the Resident Commissioner.* (U.S. Exh. 15, at 142; emphasis added.)

[27] If oceanic submerged lands abutting the Commonwealth were already included as TTPI "public lands" for the purposes of Secretarial Order No. 2969, there would have been no reason for the CNMI constitution drafters to describe oceanic submerged lands in Article XI, § 1 separately from lands transferred to the CNMI "under Secretarial Order 2969, promulgated by the U.S. Secretary of the Interior on December 26, 1974" in the same article and section of the CNMI Constitution. *See* U.S. Exh. 13, at 19. By describing oceanic submerged lands separately from lands transferred to the CNMI under Secretarial Order 2969, the framers of Article XI, § 1 of the CNMI Constitution effectively conceded that ownership and control of oceanic submerged lands would not pass to the Commonwealth pursuant to Secretarial Order No. 2969.

vehicle chosen by the Department of the Interior to transfer the civil administration of all TTPI government functions from the TTPI's High Commissioner to a U.S. Resident Commissioner. The Order was not directed to management of public lands any more than it focused on any other civil administrative function. *See* U.S. Exh. 12. The Order did not purport to implement § 801 of the Covenant, and did not authorize the Resident Commissioner to transfer title to any lands to the Commonwealth. *Id.*[28] In short, Secretarial Order No. 2989 was not the vehicle through which the United States implemented § 801 of the Covenant, much less the vehicle through which oceanic submerged lands not contemplated by § 801 were transferred to the Commonwealth.

Finally, Secretarial Order No. 2989 became effective on April 1, 1976, one week after the Covenant was enacted into law. By that date, § 1003(b) had already vested in the United States a fully protected *future* interest in the oceanic submerged lands off the coast of the Commonwealth that, pursuant to sovereignty provision of Covenant § 101, would become a fully vested *present* interest upon termination of the Trusteeship. As already explained,

[28] Secretarial Order No. 2989 remained in effect only until January 9, 1978, when the NMI's constitutional government became effective. On or about February 5, 1979, Brewster Chapman, DOI Assistant Solicitor for Territories, wrote a memorandum to the Director of DOI's Office of Territorial Affairs explaining that Secretarial Order No. 2989 was not self-executing, and did not convey any TTPI public lands to the NMI government. (U.S. Exh. 49.) Mr. Chapman concluded that an actual transfer of legal title by the Trust Territory government was required before title could vest in the Northern Marianas government. *Id.* No party has brought to the court's attention any instance in which the TTPI, after Order No. 2989, transferred any title to any real property to the Commonwealth pursuant to § 801 of the Covenant.

§ 801 of the Covenant did not authorize the Secretary of the Interior to convey or reserve to the Commonwealth ownership of oceanic submerged lands, and there is no other U.S. legislation explicitly authorizing the Secretary to convey oceanic submerged lands to the NMI government. Thus, even if Secretarial Order No. 2989 could somehow be construed as conveying to the Commonwealth the United States' future property interest in oceanic submerged lands established by Covenant § 1003(b), the court concludes that it would have been null and void as an *ultra vires* administrative action conveying an interest in United States property without explicit congressional authorization.

9. The Commonwealth's "Submerged Lands Act" and "Marine Sovereignty Act of 1980" are declared null and void under the Supremacy Clause of the U.S. Constitution, Covenant Sections 101 and 102, and Article XI, § 1, Article XIV, § 1, of the Commonwealth Constitution.

A local law is preempted by federal law when the latter is intended to occupy the field, and/or when the local law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of federal law. *Hines v. Davidowitz*, 312 U.S. 52, 66-67, 61 S.Ct. 399, 85 L.Ed. 581 (1941); *see also, Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963). The United States possesses paramount rights to submerged lands because under Covenant § 101 the CNMI ceded sovereignty to the United States, and the Supreme Court has ruled that paramount rights to such submerged lands are an incident of U.S. sovereignty. There is no merit to the CNMI's allegations that the U.S. agreed to CNMI ownership and control of oceanic submerged lands, either in Covenant § 801, in

Secretarial Order No. 2969, or in Secretarial Order No. 2989. That being the case, the CNMI's "Marine Sovereignty Act," 2 N.Mar.I.Code § 1101 *et seq.*,[25] and its "Submerged Lands Act," 2 N.Mar.I.Code § 1201 *et seq.*, U.S. Exhs. 22 and 23, including amendments thereto, are preempted because the federal paramountcy doctrine, since November 4, 1986, has "occupied the field" of regulation of the CNMI's territorial sea and exclusive economic zone ["EEZ"], and because, together, the CNMI statutes purport – in direct conflict with federal statutes – to vest sovereignty, ownership, and exclusive jurisdiction concerning submerged lands underlying a 12-mile territorial sea (as delineated by straight archipelagic baselines), as well as a 200-mile EEZ.

Under the paramountcy doctrine, federal law has "occupied the field" of regulation of submerged lands seaward of the Commonwealth's low-water mark ever since the sovereignty provisions of Covenant § 101 became effective in November, 1986. As the Supreme Court recognized in 1947:

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[25] The CNMI Marine Sovereignty Act declares that the Commonwealth is sovereign with exclusive jurisdiction over a 12-mile territorial sea, and an additional 200-mile exclusive economic zone as measured from straight archipelagic baselines. That statute bases the CNMI's claim to archipelagic status on a proposed "Revised Informal Composite Negotiating Text of the United Nations Conference on the Law of the Sea" ("ICNT"), which contemplated treating non-self-governing territories as sovereign states for the purposes of claims to a territorial sea and related marine resources. Although, at the time the Marine Sovereignty Act was enacted, the ICNT was still under consideration, it was opposed by the United States, among other countries. It ultimately was not formally adopted by the United Nations Convention on the Law of the Sea. *See* U.S. Exh. 60, at 0860-61.

> That the political agencies of this nation . . . claim and exercise broad dominion and control over our three-mile marginal belt is now a settled fact. And this assertion of national dominion over the three-mile belt is binding upon this Court. . . Not only has acquisition, as it were, of the three-mile belt, been accomplished by the national Government, but protection and control of it has been and is a function of national external sovereignty.

United States v. California, 332 U.S. at 33-34 (citations and footnotes omitted). Thus, absent congressional legislation specifically conveying control over oceanic submerged lands and associated natural resources, the Supreme Court has concluded that local governments have no authority to legislate and/or regulate concerning the territorial sea. *Id.* at 35 ("The state is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with the dominion which it seeks"). Simply put, the Commonwealth's Marine Sovereignty Act and Submerged Lands Act are preempted because the federal paramountcy doctrine (and any U.S. legislation enacted pursuant to the United States' paramount rights to waters seaward of the low-water mark) "occupy the field" of legislation in this geographical area.

As an additional ground, the CNMI Submerged Lands Act and Marine Sovereignty Act are preempted because they are in direct conflict with, and/or stand as obstacles to, the accomplishment of the purposes of several specific federal laws. Such federal laws include, among others, the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson Act"), 16 U.S.C. § 1801 *et seq.*; the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1453

et seq.; the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1361 *et seq.*; the National Marine Protection, Research and Sanctuaries Act ("Marine Sanctuaries Act"), 16 U.S.C. § 1431 *et seq.*; the Oil Pollution Act ("OPA"), 33 U.S.C. § 2701 *et seq.*, and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.* ("CERCLA"). Each of these laws expressly applies to the CNMI and regulates different activities in the territorial sea abutting the Commonwealth. In many of these laws, Congress chose to regulate expressly to the full extent of a 200-mile EEZ.[30] If enforceable, the CNMI statutes' assertions of sovereignty over a twelve-mile territorial sea, and over a 200-mile EEZ, would nullify these federal laws as they pertain to the Commonwealth. Because the CNMI "Submerged Lands Act" and "Marine Sovereignty Act" conflict with, and stand as obstacles to, the accomplishment of the full objectives of these federal laws, both CNMI statutes are declared preempted under Section 102 of the Covenant and Art. VI, cl. 2, of the U.S. Constitution.

FOR THE FOREGOING REASONS, which show that there is no genuine issue as to any material fact which would preclude entry of summary judgment, the Commonwealth's complaint to quiet title in waters seaward of the low-water mark is dismissed with prejudice, and the United States' counterclaim for a declaratory judgment

[30] *See* Magnuson Act, 16 U.S.C. § 1802(11) ("The term 'exclusive economic zone' means the zone established by Proclamation Numbered 5030, dated March 10, 1983. For purposes of applying this chapter, the inner boundary of that zone is a line coterminous with the seaward boundary of each of the coastal States."); *see also* Marine Sanctuaries Act, 16 U.S.C. §§ 1432(3), (9) (same); Oil Pollution Act, 33 U.S.C. § 2701(8) (same).

decreeing: 1) that the United States possesses "paramount rights in and powers over the waters extending seaward of the ordinary low water mark on the Commonwealth coast and the lands, minerals, and other things of value underlying such waters;" and 2) that the CNMI "Marine Sovereignty Act" and "Submerged Lands Act" are preempted by federal law, is granted.

IT IS SO ORDERED.

– For Publication on Web Site –

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, Plaintiff and Counterclaim Defendant v. UNITED STATES OF AMERICA, Defendant and Counterclaim Plaintiff	Civil Action No. 99-0028 ERRATA (Filed Aug. 11, 2003)

IT IS ORDERED that the court's order of August 7, 2003, be and hereby is amended as follows:

1. Page 12, line 1, "48 U.S.C. § 1681 note" is corrected to read "48 U.S.C. 1801 note;" and,

2. On page 34, line 6, the year "1986" is corrected to read "1996."

DATED this 11th day of August, 2003.

/s/ Alex R. Munson
ALEX R. MUNSON
Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, Plaintiff-counter-claim-defendant-Appellant, v. UNITED STATES OF AMERICA, Defendant-counter-claimant-Appellee.	No. 03-16556 D.C. No. CV-99-00028-ARM District of the Northern Mariana Islands ORDER (Filed Jul. 8, 2005)

Before: BEEZER, GRABER, and BYBEE, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges Graber and Bybee vote to deny the petitions for rehearing en banc and Judge Beezer so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

Covenant To Establish A Commonwealth of the Northern Mariana Islands In Political Union With The United States of America

ARTICLE I

Political Relationship

Section 101. The Northern Mariana Islands upon termination of the Trusteeship Agreement will become a self-governing commonwealth to be known as the "Commonwealth of the Northern Mariana Islands", in political union with and under the sovereignty of the United States of America.

Section 102. The relations between the Northern Mariana Islands and the United States will be governed by this Covenant which, together with those provisions of the Constitution, treaties and laws of the United States applicable to the Northern Mariana Islands, will be the supreme law of the Northern Mariana Islands.

Section 103. The people of the Northern Mariana Islands will have the right of local self-government and will govern themselves with respect to internal affairs in accordance with a Constitution of their own adoption.

Section 104. The United States will have complete responsibility for and authority with respect to matters relating to foreign affairs and defense affecting the Northern Mariana Islands.

Section 105. The United States may enact legislation in accordance with its constitutional processes which will be applicable to the Northern Mariana Islands, but if such legislation cannot also be made applicable to the several States the Northern Mariana Islands must be specifically named therein for it to become effective in the Northern

Mariana Islands. In order to respect the right of self-government guaranteed by this Covenant the United States agrees to limit the exercise of that authority so that the fundamental provisions of this Covenant, namely Articles I, II and III and Sections 501 and 805, may be modified only with the consent of the Government of the United States and the Government of the Northern Mariana Islands.

* * *

ARTICLE III

Citizenship and Nationality

Section 301. The following persons and their children under the age of 18 years on the effective date of this Section, who are not citizens or nationals of the United States under any other provision of law, and who on that date do not owe allegiance to any foreign state, are declared to be citizens of the United States, except as otherwise provided in Section 302:

(a) all persons born in the Northern Mariana Islands who are citizens of the Trust Territory of the Pacific Islands on the day preceding the effective date of this Section, and who on that date are domiciled in the Northern Mariana Islands or in the United States or any territory or possession thereof;

(b) all persons who are citizens of the Trust Territory of the Pacific Islands on the day preceding the effective date of this Section, who have been domiciled continuously in the Northern Mariana Islands for at least five years immediately prior to that date, and who, unless under age, registered to vote in elections for the Mariana Islands

District Legislature or for any municipal election in the Northern Mariana Islands prior to January 1, 1975; and

(c) all persons domiciled in the Northern Mariana Islands on the day preceding the effective date of this Section, who, although not citizens of the Trust Territory of the Pacific Islands, on that date have been domiciled continuously in the Northern Mariana Islands beginning prior to January 1, 1974.

Section 302. Any person who becomes a citizen of the United States solely by virtue of the provisions of Section 301 may within six months after the effective date of that Section or within six months after reaching the age of 18 years, whichever date is the later, become a national but not a citizen of the United States by making a declaration under oath before any court established by the Constitution or laws of the United States or any court of record in the Commonwealth in the form as follows:

> *"I . . . being duly sworn, hereby declare my intention to be a national but not a citizen of the United States.*

Section 303. All persons born in the Commonwealth on or after the effective date of this Section and subject to the jurisdiction of the United States will be citizens of the United States at birth.

Section 304. Citizens of the Northern Mariana Islands will be entitled to all privileges and immunities of citizens in the several States of the United States.

ARTICLE IV

Judicial Authority

Section 401. The United States will establish for and within the Northern Mariana Islands a court of record to be known as the "District Court for the Northern Mariana Islands". The Northern Mariana Islands will constitute a part of the same judicial circuit of the United States as Guam.

* * *

ARTICLE V

Applicability of Laws

Section 501.

(a) To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States: Article I, Section 9, Clauses 2, 3 and 8; Article I, Section 10, Clauses 1 and 3; Article IV, Section 1 and Section 2, Clauses 1 and 2; Amendments 1 through 9, inclusive; Amendment 13; Amendment 14, Section 1; Amendment 15, Amendment 19; and Amendment 26; provided, however, that neither trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution based on local law, except where required by local law. Other provisions of or amendments to the Constitution of the United States, which do not apply of their own force within the Northern Mariana Islands, will be applicable within the Northern Mariana Islands only with the approval of the Goverment of the

Northern Mariana Islands and of the Government of the United States.

(b) The applicability of certain provisions of the Constitution of the United States to the Northern Mariana Islands will be without prejudice to the validity of and the power of the Congress of the United States to consent to Sections 203, 506 and 805 and the proviso in Subsection (a) of this Section.

Section 502.

(a) The following laws of the United States in existence on the effective date of this Section and subsequent amendments to such laws will apply to the Northern Mariana islands, except as otherwise provided in this Covenant:

(1) those laws which provide federal services and financial assistance programs and the federal banking laws as they apply to Guam; Section 228 of Title II and Title XVI of the Social Security Act as it applies to the several States; the Public Health Service Act as it applies to the Virgin Islands; and the Micronesian Claims Act as it applies to the Trust Territory of the Pacific islands;

(2) those laws not described in paragraph (1) which are applicable to Guam and which are of general application to the several States as they are applicable to the several States; and

(3) those laws not described in paragraphs (1) or (2) which are applicable to the Trust Territory of the Pacific Islands, but not their subsequent amendments unless specifically made applicable to the Northern Mariana Islands, as they apply to the Trust Territory of

the Pacific Islands until termination of the Trusteeship Agreement, and will thereafter be inapplicable.

(b) The laws of the United States regarding coastal shipments and the conditions of employment, including the wages and hours of employees, will apply to the activities of United States Government and its contractors in the Northern Mariana Islands.

Section 503. The following laws of the United States, presently inapplicable to the Trust Territory of the Pacific Islands, will not apply to the Northern Mariana Islands except in the manner and to the extent made applicable to them by the Congress by law after termination of the Trusteeship Agreement:

(a) except as otherwise provided in Section 506, the immigration and naturalization laws of the United States;

(b) except as otherwise provided in Subsection (b) of Section 502, the coastwise laws of the United States and any prohibition in the laws of the United States against foreign vessels landing fish or unfinished fish products in the United States; and

(c) the minimum wage provisions of Section 6, Act of June 25, 1938, 52 Stat. 1062, as amended.

Section 504. The President will appoint a Commission on Federal laws to survey the laws of the United States and to make recommendations to the United States Congress as to which laws of the United States not applicable to the Northern Mariana Islands should be made applicable and to what extent and in what manner, and which applicable laws should be made inapplicable and to what extent and in what manner. The Commission will consist of seven persons (at least four of whom will be

citizens of the Trust Territory of the Pacific Islands who are and have been for at least five years domiciled continuously in the Northern Mariana Islands at the time of their appointments) who will be representative of the federal, local, private and public interests in the applicability of laws of the United States to the Northern Mariana Islands. The Commission will make its final report and recommendations to the Congress within one year after the termination of the Trusteeship Agreement, and before that time will make such interim reports and recommendations to the Congress as it considers appropriate to facilitate the transition of the Northern Mariana Islands to its new political status. In formulating its recommendations the Commission

* * *

fiscal year by a percentage which will be the same as the percentage change in the United States Department of Commerce composite price index using the beginning of Fiscal Year 1975 as the base.

(d) Upon expiration of the seven year period of guaranteed annual direct grant assistance provided by Section 702, the annual level of payments in each category listed in Section 702 will continue until Congress appropriates a different amount or otherwise provides by law.

ARTICLE VIII

Property

Section 801. All right, title and interest of the Government of the Trust Territory of the Pacific Islands in and to real property in the Northern Mariana Islands on the date of the signing of this Covenant or thereafter acquired in

any manner whatsoever will, no later than upon the termination of the Trusteeship Agreement, be transferred to the Government of the Northern Mariana Islands. All right, title and interest of the Government of the Trust Territory of the Pacific Islands in and to all personal property on the date of the signing of this Covenant or thereafter acquired in any manner whatsoever will, no later than upon the termination of the Trusteeship Agreement, be distributed equitably in a manner to be determined by the Government of the Trust Territory of the Pacific Islands in consultation with those concerned, including the Government of the Northern Mariana Islands.

Section 802.

(a) The following property will be made available to the Government of the United States by lease to enable it to carry out its defense responsibilities:

(1) on Tinian Island, approximately 17,799 acres (7,203 hectares) and the waters immediately adjacent thereto;

(2) on Saipan Island, approximately 177 acres (72 hectares) at Tanapag Harbor; and

(3) On Farallon de Medinilla Island, approximately 206 acres (83 hectares) encompassing the entire island, and the waters immediately adjacent thereto.

(b) The United States affirms that it has no present need for or, present intention to acquire any greater interest in property listed above than that which is granted to it under Subsection 803(a), or to acquire any

property in addition to that listed in Subsection (a), above, in order to carry out its defense responsibilities.

Section 803.

(a) The Government of the Northern Mariana Islands will lease the property described in Subsection 802(a) to the Government of the United States for a term of fifty years, and the Government of the United States will have the option of renewing this lease for all or part of such property for an additional term of fifty years if it so desires at the end of the first term.

(b) The Government of the United States will pay to the Government of the Northern Mariana Islands in full settlement of this lease, including the second fifty year term of the lease if extended under the renewal option, the total sum of $19,520,600, determined as follows:

(1) for that property on Tinian Island, $17.5 million;

(2) for that property at Tanapag Harbor on Saipan Island, $2 million; and

(3) for that property known as Farallon de Medinilla, $20,600.

The sum stated in this Subsection will be adjusted by a percentage which will be the same as the percentage change in the United States Department of Commerce composite price index from the date of signing the Covenant.

(c) A separate Technical Agreement Regarding Use of Land To Be Leased by the United States in the Northern Mariana Islands will be executed simultaneously with this

Covenant. The terms of the lease to the United States will be in accordance with this Section and with the terms of the Technical Agreement. The Technical Agreement will also contain terms relating to the leaseback of property, to the joint use arrangements for San Jose Harbor and West Field on Tinian Island, and to the principles which will govern the social structure relations between the United States military and the Northern Mariana Islands civil authorities.

(d) From the property to be leased to it in accordance with this Covenant the Government of the United States will lease back to the Government of the Northern Mariana Islands, in accordance with the Technical Agreement, for the sum of one dollar per acre per year, approximately 6,458 acres (2,614 hectares) on Tinian Island and approximately 44 acres (18 hectares) at Tanapag Harbor on Saipan Island, which will be used for purposes compatible with their intended military use.

(e) From the property to be leased to it at Tanapag Harbor on Saipan Island the Government of the United States will make available to the Government of the Northern Mariana Islands 133 acres (54 hectares) at no cost. This property will be set aside for public use as an American memorial park to honor the American and Marianas dead in the World War II Marianas Campaign. The $2 million received from the Government of the United States for the lease of this property will be placed into a trust fund, and used for the development and maintenance of the park in accordance with the Technical Agreement.

Section 804.

(a) The Government of the United States will cause all agreements between it and the Government of the Trust Territory of the Pacific Islands which grant to the Government of the United States use or other rights in real property in the Northern Mariana Islands to be terminated upon or before the effective date of this Section. All right, title and interest of the Government of the Trust Territory of the Pacific Islands in and to any real property with respect to which the Government of the United States enjoys such use or other rights will be transferred to the Government of the Northern Mariana Islands at the time of such termination. From the time such right, title and interest is so transferred the Government of the Northern Mariana Islands will assure the Government of the United States the continued use of the real property then actively used by the Government of the United States for civilian governmental purposes on terms comparable to those enjoyed by the Government of the United States under its arrangements with the Government of the Trust Territory of the Pacific Islands on the date of the signature of this Covenant.

(b) All facilities at Isely Field developed with federal aid and all facilities at that field usable for the landing and take-off of aircraft will be available to the United States for use by military and naval aircraft, in common with other aircraft, at all times without charge, except if the use by military and naval aircraft shall be substantial, a reasonable share, proportional to such use, of the cost of operating and maintaining the facilities so used may be charged at a rate established by agreement between the Government of the Northern Mariana Islands and the Government of the United States.

Section 805. Except as otherwise provided in this Article, and notwithstanding the other provisions of this Covenant, or those provisions of the Constitution, treaties or laws of the United States applicable to the Northern Mariana Islands, the Government of the Northern Mariana Islands, in view of the importance of the ownership of land for the culture and traditions of the people of the Northern Mariana Islands, and in order to protect them against exploitation and to promote their economic advancement and self-sufficiency:

(a) will until twenty-five years after the termination of the Trusteeship Agreement, and may thereafter, regulate the alienation of permanent and long-term interests in real property so as to restrict the acquisition of such interests to persons of Northern Mariana Islands descent; and

(b) may regulate the extent to which a person may own or hold land which is now public land.

Section 806.

(a) The United States will continue to recognize and respect the scarcity and special importance of land in the Northern Mariana Islands. If the United States must acquire any interest in real property not transferred to it under this Covenant, it will follow the policy of seeking to acquire only the minimum area necessary to accomplish the public purpose for which the real property is required, of seeking only the minimum interest in real property necessary to support such public purpose, acquiring title only if the public purpose cannot be accomplished if a lesser interest is obtained, and of seeking first to satisfy

its requirement by acquiring an interest in public rather than private real property.

(b) The United States may, upon prior written notice to the Government of the Northern Mariana Islands, acquire for public purposes in accordance with federal laws and procedures any interest in real property in the Northern Mariana Islands by purchase, lease, exchange, gift or otherwise under such terms and conditions as may be negotiated by the parties. The United States will in all cases attempt to acquire any interest in real property for public purposes by voluntary means under this Subsection before exercising the power of eminent domain. No interest in real property will be acquired unless duly authorized by the Congress of the United States and appropriations are available therefor.

(c) In the event it is not possible for the United States to obtain an interest in real property for public purposes by voluntary means, it may exercise within the Commonwealth the power of eminent domain to the same extent and in the same manner as it has and can exercise the power of eminent domain in a State of the Union. The power of eminent domain will be exercised within the Commonwealth only to the extent necessary and in compliance with applicable United States laws, and with full recognition of the due process required by the United States Constitution.

* * *

Section 904.

(a) The Government of the United States will give sympathetic consideration to the views of the Government

of the Northern Mariana Islands on international matters directly affecting the Northern Mariana Islands and will provide opportunities for the effective presentation of such views to no less extent than such opportunities are provided to any other territory or possession under comparable circumstances.

(b) The United States will assist and facilitate the establishment by the Northern Mariana Islands of offices in the United States and abroad to promote local tourism and other economic or cultural interests of the Northern Mariana Islands.

(c) On its request the Northern Mariana Islands may participate in regional and other international organizations concerned with social, economic, educational, scientific, technical and cultural matters when similar participation is authorized for any other territory or possession of the United States under comparable circumstances.

ARTICLE X

Approval, Effective Dates, and Definitions

Section 1001.

(a) This Covenant will be submitted to the Mariana Islands District Legislature for its approval. After its approval by the Mariana Islands District Legislature, this Covenant will be submitted to the people of the Northern Mariana Islands for approval in a plebiscite to be called by the United States. Only persons who are domiciled exclusively in the Northern Mariana Islands and who meet such other qualifications, including timely registration, as are promulgated by the United States as administering

authority will be eligible to vote in the plebiscite. Approval must be by a majority of at least 55% of the valid votes cast in the plebiscite. The results of the plebiscite will be certified to the President of the United States.

(b) This Covenant will be approved by the United States in accordance with its constitutional processes and will thereupon become law.

Section 1002. The President of the United States will issue a proclamation announcing the termination of the Trusteeship Agreement, or the date on which the Trusteeship Agreement will terminate, and the establishment of the Commonwealth in accordance with this Covenant. Any determination by the President that the Trusteeship Agreement has been terminated or will be terminated on a day certain will be final and will not be subject to review by any authority, judicial or otherwise, of the Trust Territory of the Pacific Islands, the Northern Mariana Islands or the United States.

Section 1003. The provisions of this Covenant will become effective as follows, unless otherwise specifically provided:

(a) Section 105, 201-203, 503, 504, 606, 801, 903 and Article X will become effective on approval of this Covenant;

(b) Sections 102, 103, 204, 304, Article IV, Sections 501, 502, 505, 601-605, 607, Article VII, Sections 802-805, 901 and 902 will become effective on a date to be determined and proclaimed by the President of the United States which will be not more than 180 days after this Covenant and the Constitution of the Northern Mariana Islands have both been approved; and

(c) The remainder of this Covenant will become effective upon the termination of the Trusteeship Agreement and the establishment of the Commonwealth of the Northern Mariana Islands.

Section 1004.

(a) The application of any provision of the Constitution or laws of the United States which would otherwise apply to the Northern Mariana Islands may be suspended until termination of the Trusteeship Agreement if the President finds and declares that the application of such provision prior to termination would be inconsistent with the Trusteeship Agreement.

(b) The Constitution of the Northern Mariana Islands will become effective in accordance with its terms on the same day that the provisions of this Covenant specified in Subsection 1003(b) become effective, provided that if the President finds and declares that the effectiveness of any provision of the Constitution of the Northern Mariana Islands prior to termination of the Trusteeship Agreement would be inconsistent with the Trusteeship Agreement such provision will be ineffective until termination of the Trusteeship Agreement Upon the establish-

* * *

PREFACE: SOURCES OF GOVERNMENTAL, AUTHORITY
DOCUMENTS RELATING TO THE U.N. TRUST TERRITORY

Trusteeship Agreement for the Former Japanese Mandated Islands

Commission Comment: The Trusteeship Agreement was approved by the United Nations Security Council on April 2, 1947, and ratified by the United States on July 18, 1947; see page A-113.

Preamble

WHEREAS Article 75 of the Charter of the United Nations provides for the establishment of an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent agreement; and

WHEREAS under Article 77 of the said Charter the trusteeship system may be applied to territories now held under mandate; and

WHEREAS on 17 December 1920 the Council of the League of Nations confirmed a mandate for the former German Islands north of the equator to Japan, to be administered in accordance with Article 22 of the Covenant of the League of Nations; and

WHEREAS Japan, as a result of the Second World War, has ceased to exercise any authority in these islands;

NOW THEREFORE, the Security Council of the United Nations, having satisfied itself that the relevant articles of the Charter have been complied with, hereby resolves to approve the following terms of trusteeship for the Pacific Islands formerly under mandate to Japan.

Article 1

The Territory of the Pacific Islands, consisting of the islands formerly held by Japan under mandate in accordance with Article 22 of the Covenant of the League of Nations, is hereby designated as a strategic area and placed under the trusteeship system established in the Charter of the United Nations. The Territory of the Pacific Islands is hereinafter referred to as the trust territory.

Article 2

The United States of America is designated as the administering authority of the trust territory.

Article 3

The administering authority shall have full powers of administration, legislation, and jurisdiction over the territory subject to the provisions of this agreement, and may apply to the trust territory, subject to any modifications which the administering authority may consider desirable such of the laws of the United States as it may deem appropriate to local conditions and requirements.

Article 4

The administering authority, in discharging the obligations of trusteeship in the trust territory, shall act in accordance with the Charter of the United Nations, and the provisions of this agreement, and shall, as specified in Article 83(2) of the Charter, apply the objectives of the international trusteeship system, as set forth in Article 76 of the Charter, to the people of the trust territory.

Article 5

In discharging its obligations under Article 76(a) and Article 84, of the Charter, the administering authority shall ensure that the trust territory shall play its part, in accordance with the Charter of the United Nations, in the maintenance of international peace and security. To this end the administering authority shall be entitled:

1. to establish naval, military and air bases and to erect fortifications in the trust territory;

2. to station and employ armed forces in the territory; and

3. to make use of volunteer forces, facilities and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority, as well as for the local defense, and the maintenance of law and order within the trust territory.

Article 6

In discharging its obligations under Article 76(b) of the Charter, the administering authority shall:

1. foster the development of such political institutions as are suited to the trust territory and shall promote the development of the inhabitants of the trust territory toward self-government or independence as may be appropriate to the particular circumstances of the trust territory and its peoples and the freely expressed wishes of the peoples concerned; and to this end shall give to the inhabitants of the trust territory a progressively increasing share in the administrative services in the territory; shall

develop their participation in government; and give due recognition to the customs of the inhabitants in providing a system of law for the territory; and shall take other appropriate measures toward these ends;

2. promote the economic advancement and self-sufficiency of the inhabitants, and to this end shall regulate the use of natural resources; encourage the development of fisheries, agriculture, and industries; protect the inhabitants against the loss of their lands and resources; and improve the means of transportation and communication;

3. promote the social advancement of the inhabitants and to this end shall protect the rights and fundamental freedoms of all elements of the population without discrimination; protect the health of the inhabitants; control the traffic in arms and ammunition, opium and other dangerous drugs, and alcoholic and other spirituous beverages; and institute such other regulations as may be necessary to protect the inhabitants against social abuses; and

4. promote the educational advancement of the inhabitants, and to this end shall take steps toward the establishment of a general system of elementary education; facilitate the vocational and cultural advancement of the population; and shall encourage qualified students to pursue higher education, including training on the professional level.

Article 7

In discharging its obligations under Article 76(c), of the Charter, the administering authority shall guarantee

to the inhabitants of the trust territory freedom of conscience, and, subject only to the requirements of public order and security, freedom of speech, of the press, and of assembly; freedom of worship, and of religious teaching; and freedom of migration and movement.

Article 8

1. In discharging its obligations under Article 76(d) of the Charter, as defined by Article 83(2) of the Charter, the administering authority, subject to the requirements of security, and the obligation to promote the advancement of the inhabitants, shall accord to nationals of each Member of the United Nations and to companies and associations organized in conformity with the laws of such Member, treatment in the trust territory no less favourable than that accorded therein to nationals, companies and associations of any other United Nation except the administering authority.

2. The administering authority shall ensure equal treatment to the Members of the United Nations and their nationals in the administration of justice.

3. Nothing in this Article shall be so construed as to accord traffic rights to aircraft flying into and out of the trust territory. Such rights shall be subject to agreement between the administering authority and the state whose nationality such aircraft possesses.

4. The administering authority may negotiate and conclude commercial and other treaties and agreements with Members of the United Nations and other states, designed to attain for the inhabitants of the trust territory treatment by the Members of the United Nations and

other states no less favourable than that granted by them to the nationals of other states. The Security Council may recommend, or invite other organs of the United Nations to consider and recommend what rights the inhabitants of the trust territory should acquire in consideration of the rights obtained by Members of the United Nations in the trust territory.

Article 9

The administering authority shall be entitled to constitute the trust territory into a customs, fiscal, or administrative union or federation with other territories under United States jurisdiction and to establish common services between such territories and the trust territory where such measures are not inconsistent with the basic objectives of the International Trusteeship System and with the terms of this agreement.

Article 10

The administering authority, acting under the provisions of Article 3 of this agreement, may accept membership in any regional advisory commission, regional authority, or technical organization, or other voluntary association of states, may cooperate with specialized international bodies, public or private, and may engage in other forms of international cooperation.

Article 11

1. The administering authority shall take the necessary steps to provide the status of citizenship of the trust territory for the inhabitants of the trust territory.

2. The administering authority shall afford diplomatic and consular protection to inhabitants of the trust territory when outside the territorial limits of the trust territory or of the territory of the administering authority.

Article 12

The administering authority shall enact such legislation as may be necessary to place the provisions of this agreement in effect in the trust territory.

Article 13

The provisions of Articles 87 and 88 of the Charter shall be applicable to the trust territory, provided that the administering authority may determine the extent of their applicability to any areas which may from time to time be specified by it as closed for security reasons.

Article 14

The administering authority undertakes to apply in the trust territory the provisions of any international conventions and recommendations which may be appropriate to the particular circumstances of the trust territory and which would be conducive to the achievement of the basic objectives of Article 6 of this agreement.

Article 15

The terms of the present agreement shall not be altered, amended or terminated without the consent of the administering authority.

Article 16

The present agreement shall come into force when approved by the Security Council of the United Nations and by the Government of the United States after due constitutional process.

(2)

FILED
FEB 17 2006
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SUPREME COURT, U.S.

No. 05-457

In the Supreme Court of the United States

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America," Pub. L. No. 94-241, 90 Stat. 263, provides that, upon termination of the governing United Nations Trusteeship Agreement, the Northern Mariana Islands would become a self-governing commonwealth in political union with, and under the sovereignty of, the United States. The question presented is whether the United States obtained paramount rights in, and powers over, oceanic submerged lands extending seaward of the coastline of the Northern Mariana Islands as a result of the covenant by the people of the Commonwealth to place themselves under the sovereignty of the United States.

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In the Supreme Court of the United States

No. 05-457

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 399 F.3d 1057. The opinion of the district court (Pet. App. 21-79) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 2005. A petition for rehearing was denied on July 8, 2005 (Pet. App. 81). The petition for a writ of certiorari was filed on October 6, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Commonwealth of the Northern Mariana Islands (CNMI) brought this quiet title action against the United States under 28 U.S.C. 2409a, asserting a claim of

jurisdiction over oceanic submerged lands and marine resources from its coastline to a distance of 200 nautical miles. The district court ruled on cross-motions for summary judgment that the United States has paramount authority over those lands and resources as a necessary and retained element of its national sovereignty. Pet. App. 20-79. The court of appeals affirmed. *Id.* at 1-19.

1. In 1947, the United Nations Security Council entered into an agreement with the United States providing that the United States, as Trustee, would exercise non-sovereign oversight authority over the peoples of the Trust Territory of the Pacific Islands (TTPI). Pet. App. 24. In 1966, the six administrative districts of the TTPI petitioned the United States to establish a joint commission to consider the future political status of the TTPI. *Id.* at 25.

The Northern Mariana Islands (NMI) administrative district entered into separate negotiations with the United States because it desired a closer and more permanent relationship with the United States than that sought by the other districts. Pet. App. 25. The NMI ultimately chose to become a commonwealth under United States sovereignty. That status was embodied in the "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America" (Covenant), signed by representatives of the NMI and the United States on February 15, 1975. See *id.* at 29-30. After endorsement by the NMI legislature and approval by vote of the people of the NMI, Congress enacted the Covenant as law. Pub. L. No. 94-241, 90 Stat. 263 (48 U.S.C. 1801 note); Pet. App. 82-97.

The Covenant defines the political relationship between the CNMI and the United States. Upon termination of the United Nations Trusteeship, the CNMI would become a self-governing commonwealth in political union with, and under the sovereignty of, the United States. Covenant § 101;

see Pet. App. 82. Section 104 of the Covenant provides that the United States would have complete responsibility for, and authority with respect to, foreign affairs and defense affecting the NMI. See *ibid.*

Section 801 of the Covenant provides for the disposition of property formerly owned by the TTPI Government:

> All right, title and interest of the Government of the Trust Territory of the Pacific Islands in and to real property in the Northern Mariana Islands on the date of the signing of this Covenant or thereafter acquired in any manner whatsoever will, no later than upon the termination of the Trusteeship Agreement, be transferred to the Government of the Northern Mariana Islands. * * *

Pet. App. 88-89.

In accordance with Section 201, the people of the NMI formulated and ratified a Constitution for the CNMI. Pet. App. 34. Article XI, Section 1 of the CNMI Constitution provides that "the submerged lands off the coast of the Commonwealth to which the Commonwealth now or hereafter may have a claim of ownership under U.S. law are public lands and belong collectively to the people of the Commonwealth who are of Northern Marianas descent." *Ibid.* The *Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands*, adopted by the NMI Constitutional Convention, explained the effect of the United States assumption of sovereignty on jurisdiction over submerged lands:

> [Article XI,] Section 1 includes all submerged lands to which the Commonwealth now or at any time in the future may have any right, title or interest. The United States is the owner of submerged lands off the coasts of the states under territorial waters. The states have no rights in these lands beyond that transferred by the United States. The federal power over these lands is based on the provi-

> sions of the United States Constitution with respect to defense and foreign affairs. Under aticle 1 [*sic*], section 104, of the Covenant, the United States has defense and foreign affairs powers with respect to the Commonwealth and thus has a claim to the submerged lands off the coast of the Commonwealth as well. Section 1 recognizes this claim and also recognizes that the Commonwealth is entitled to the same interest in the submerged lands off its coasts as the United States grants to the states with respect to the submerged lands off their coasts. Under this section, any interest in the submerged lands granted to the states or to the Commonwealth in the future also will become part of the public lands of the Commonwealth.

Pet. App. 35-36 (quoting U.S. Exh. 15, C.A. E.R. 1178).

CNMI officials nevertheless later suggested that the CNMI might have permanent jurisdiction over offshore submerged lands without regard to whether Congress has transferred title to those lands. Pet. App. 39. The CNMI legislature enacted statutes in 1979 and 1980 asserting that the CNMI had exclusive jurisdiction over submerged lands and offshore marine resources "out to the ocean to a distance of two hundred nautical miles," and providing for the granting of leases for the development of petroleum or minerals in that area. *Id.* at 41-42. The legislation purports to assert that the CNMI has sovereignty over a twelve-mile territorial sea, as measured from straight archipelagic baselines, as well as a 200-mile exclusive economic zone measured from the same baselines. *Id.* at 42.

On November 3, 1986, President Reagan issued Proclamation No. 5564, declaring that the United Nations Trusteeship was terminated with respect to the NMI. See 51 Fed. Reg. 40,399; Pet. App. 45-46. In accordance with Section 1002 of the Covenant, see *id.* at 96, the President proclaimed that Sections 101 and 104, among others, would become effective

on November 4, 1986, and that, as of that date, "[t]he Commonwealth of the Northern Mariana Islands in political union with and under the sovereignty of the United States of America is fully established." 51 Fed. Reg. at 40,400. United States officials thereafter made several offers to sponsor legislation that would grant the CNMI authority to control submerged lands and marine resources to a distance of three miles from the coastline, but the CNMI declined those offers. Pet. App. 48.

2. The CNMI filed two related actions under the Quiet Title Act (QTA), 28 U.S.C. 2409a, claiming exclusive jurisdiction over submerged lands and marine resources from the low-water mark of its coastline to a seaward distance of two hundred nautical miles. The district court initially dismissed the actions as barred by the QTA's 12-year statute of limitations, 28 U.S.C. 2409a(g). The court of appeals reversed, holding that the CNMI petitioner should be treated as a State for purposes of this provision, which makes an exception for "an action brought by a State." 28 U.S.C. 2409a(g); see *Northern Mariana Islands* v. *United States*, 279 F.3d 1070, 1073 (9th Cir. 2002).

On remand, the parties filed cross-motions for summary judgment. In a lengthy opinion, the district court dismissed the CNMI's claim of title to the offshore submerged lands, and it granted the United States' counterclaim for a declaratory judgment. See Pet. App. 21-79. The court ruled that the United States possesses paramount rights over the waters extending seaward of the ordinary low-water mark and over the lands, minerals, and other things of value underlying such waters. The court concluded that the United States acquired paramount authority over the submerged lands lying seaward of the CNMI's coastline as an incident of the United States' acquisition of external sovereignty under Article I of the Covenant. See *id.* at 49.

The district court determined that this Court's decisions, beginning with *United States* v. *California*, 332 U.S. 19, supplemented by 332 U.S. 804 (1947), established that the United States' paramount authority over submerged lands seaward of the low water mark is vested in the United States as a necessary element of national external sovereignty. Pet. App. 50-51 (also citing *United States* v. *Louisiana*, 339 U.S. 699 (1950); *United States* v. *Texas*, 339 U.S. 707 (1950); and *United States* v. *Maine*, 420 U.S. 515 (1975)). The court concluded that the "paramountcy doctrine" developed in those cases applies to United States territories as well as to States. *Id.* at 51-52.

The district court also noted that, while Congress may transfer submerged lands out of federal ownership, Section 801 of the Covenant did not effect such a transfer because it did not contain language indicating an intent to convey submerged lands to the CNMI. Pet. App. 53-59. The court likewise ruled that the CNMI's enactment of legislation purporting to confirm the CNMI's claim of title to the submerged lands was ineffective, because the federal paramountcy doctrine (and United States legislation enacted pursuant to the United States' paramount rights to waters seaward of the low-water mark) occupy the field in the case of oceanic submerged lands and because the CNMI statutes are in direct conflict with several specific federal laws. *Id.* at 75-78.

3. The court of appeals affirmed. Pet. App. 2. The court of appeals first reviewed this Court's paramountcy decisions and rejected the CNMI's argument that the paramountcy doctrine should not apply in this case. *Id.* at 6-11. The court specifically observed that it had previously ruled in *Native Village of Eyak* v. *Trawler Diane Marie, Inc.*, 154 F.3d 1090 (9th Cir. 1998), cert. denied, 527 U.S. 1003 (1999), that the paramountcy doctrine extends to claims to offshore areas